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569 S.W.2d 330 printed in FULL format.

Forest City, Missouri, a Municipal Corporation, Appellant, v. City Of Oregon, Missouri, a Municipal Corporation, Respondent

No. KCD29559

Court of Appeals of Missouri, Kansas City District

569 S.W.2d 330; 1978 Mo. App. LEXIS 2184

July 3, 1978

SUBSEQUENT HISTORY: [**1]

Motion for Rehearing Overruled July 31, 1978. Transfer Denied. Application to Supreme Court for Transfer Denied September 12, 1978.

PRIOR HISTORY:

From the Circuit Court of Holt County

Civil Appeal

Special Judge L. Frank Cottey

DISPOSITION: Affirmed

CORE TERMS: water, public service commission, municipality, inhabitants, gallons, nonresidents, rates charged, municipally, residents, public service, waterworks, municipal, regulation, public utilities, supplied, appointed, revision, site, effective, custom, usage, statutory authority, assume jurisdiction, power to regulate, cause of action, water rate, equitable, ordinance, furnish, asking

COUNSEL: Theodore M. Kranitz, St. Joseph, Missouri, Attorney for Appellant; Rupert G. Usrey, Oregon, Missouri, Attorney for Respondent.

JUDGES: Shangler, P.J., Swofford, C.J., Wasserstrom, J.

OPINIONBY: WASSERSTROM

OPINION: [*331] Forest City filed suit against the City of Oregon in three counts. The first two counts sought equitable relief against an increase in water rates, while the third count sought condemnation of certain fire hydrants. The trial court sustained a motion to dismiss as to the first two, n1 and ruled that judgment separate and final for purposes of appeal. Forest City appeals from that judgment. Counsel for Oregon have filed no brief nor made any appearance in this court, thereby increasing the difficulty of dealing with this appeal. We nevertheless affirm.

n1 The judgment considered not only the pleadings filed but also "the stipulations and agreements of counsel entered into at the pretrial conference" and the court found that Counts I and II "fail to state a claim upon which relief can be granted and that there is no genuine issue as to any material fact alleged in these counts of plaintiff's petition." The judgment therefore appears to have been as much in the nature of a summary judgment under Rule 74.04 as it does a judgment sustaining motion to dismiss.

[**2]

The parties have stipulated as to the facts. On January 26, 1898, Oregon, through appointed agents, and Forest City, through an appointed committee, entered into what purported to be a contract n2 providing for Oregon to erect a waterworks within the town limits of Forest City (under which lies a supply of underground water) to supply water to both cities and their respective inhabitants. Forest City supplied the site and $800 for the enterprise, and Oregon assumed the balance of all expense. Under the agreement, Oregon undertook "to furnish said Town of Forest City water at reasonable rates and to furnish water to its inhabitants at the same rates and on the same terms as water is hereafter by said City of Oregon furnished to the inhabitants of the City of Oregon."

n2 Forest City makes no effort in this case to enforce the "contract" dated January 26, 1898, as such. In its petition it states that the validity and enforceability of that instrument as a contract "is not an issue in this case."

In 1954, Oregon [**3] abandoned the original water-

works site and constructed a new one at a different site within the limits of Forest City entirely at the expense of the residents of Oregon, who floated a general obligation bond issue for that purpose. At all times from 1898 until 1976, Oregon continuously supplied water to the inhabitants of Forest City at the same rate that water was supplied to the inhabitants of Oregon.

However, on May 12, 1976, Oregon adopted Ordinance No. 125 which established a water rate for nonresidents higher than that to be charged residents. n3 Forest City protested the adoption of the new rates, [*332] and an approach of some undisclosed character was made to the Missouri Public Service Commission. The stipulation of facts states that "the parties have been informed by the Missouri Public Service Commission that, in the opinion of the Commission, it has no jurisdiction over the regulation of rates charged by the City of Oregon for water sold to residents of the City of Forest City * * * Counsel for the parties have been informed by the Public Service Commission of Missouri that it will assume jurisdiction of the dispute if requested to do so by the City of Oregon." Oregon [**4] has declined to make such a request to the Commission.

n3 Residents of Oregon were to be charged a minimum of $3.15 for the first 1000 gallons, $1.65 for the next 2000 gallons, $1.40 for the next 3000 gallons and $1.15 for all water in excess of 6000 gallons.

Nonresidents were to be charged a minimum of $3.65 for the first 1000 gallons, $2.15 for the next 2000 gallons, $1.90 for the next 3000 gallons and $1.65 for all water in excess of 6000 gallons.

For its first point on this appeal, Forest City contends that the trial court erred in dismissing Counts I and II of the petition for the reasons "more specifically outlined in Points II and III hereof." Its Point II contends that Count I of the petition stated a cause of action "in asking the trial court in the exercise of its equitable powers, to pass on the legality of the proposed water rate increase; or on the necessity for it; or on any other aspect of the proposed increase, including the question of whether or not the rate classification and disparity which [**5] defendant seeks to establish in its ordinance is reasonable." Its Point III contends that Count II of the petition stated a cause of action "in asking the trial court in the exercise of its equitable powers to transfer the cause to the Public Service Commission, or to compel defendant to request the Commission to assume jurisdiction."

The first of Forest City's points serves only as an introduction to the other two points and states no independent ground of review. Therefore, only Points II and III need be discussed. They will be taken up in reverse order.

I.

Jurisdiction of the Public Service Commission

In the argument portion of its brief, Forest City suggests that the Commission does have statutory authority to pass upon and regulate the water rates charged by Oregon to the residents of Forest City. It errs in that suggestion.

The 1913 original Public Service Commission Act did grant to the Commission specific power to regulate rates and services of municipally operated public utilities. That authority was thereafter somewhat narrowed by a 1917 amendment which limited the Commission to jurisdiction of such rates to only those rates charged for water used beyond the corporate [**6] limits of the municipality. n4

n4 The 1917 amendment still remains as presently numbered Section 386.250(7) which grants jurisdiction to the Public Service Commission as follows:

"The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

* * *

(7) To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state; provided, that nothing contained in this section shall be construed as conferring jurisdiction upon the public service commission over the service or rates of any municipally owned water plant or system in any city of this state, except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality."

All statutory references in this opinion are to RSMo 1969, unless otherwise specifically noted.

Pursuant to these statutory provisions, the Missouri Supreme Court initially considered [**7] that the Commission had the power to regulate water rates charged by municipal corporations sold beyond its borders. *Public Service Commission v. City of Kirkwood, 319 Mo. 562, 4 S.W.2d 773 (1928); Speas v. Kansas City, 329 Mo. 184, 44 S.W.2d 108 (1931).* However, the Supreme Court subsequently ruled that the statutory grant of power to the Commission to regulate munici-

pally owned public utilities was unconstitutional. *City of Columbia v. State Public Service Commission, 329 Mo. 38, 43 S.W.2d 813 (1931); State ex rel. Union Electric Light & Power Co. v. Public Service Commission, 333 Mo. 426, 62 S.W.2d [*333] 742 (1933); State ex rel. City of Sikeston v. Public Service Commission of Missouri, 336 Mo. 985, 82 S.W.2d 105 (1935).*

This series of opinions left some doubt as to the status of the Commission's authority concerning any regulation of municipally owned utilities. This problem was directly addressed by the legislature by its 1949 statutory revision. At that time the sections defining the powers of the Commission were changed to delete authority for jurisdiction over municipal utilities. n5

n5 See revision comment to Section 393.130 which reads as follows:

"As originally enacted, sections 5645, 5646, 5647, 5648 and 5659, R.S. 1939, empowered the Public Service Commission to regulate municipally owned and operated utilities. However, in *City of Columbia v. Public Service Commission, 329 Mo. 38, 43 S.W.2d 813,* the Supreme Court ruled that the Commission did not have such power. Therefore these sections were repealed and reenacted as this section and Sections 393.140 to 393.160 omitting the reference to municipal utilities."

[**8]

Notwithstanding the 1949 revisions just mentioned, Section 386.250(7) was left on the statute books intact. Two administrative legal opinions have been rendered, both concurring in the opinion that Section 386.250(7) is not effective alone to confer any power upon the Commission to regulate municipal utility rates, even with respect to water sold beyond the corporate limits. Opinion of the Attorney General No. 6 dated April 27, 1967; Opinion of the General Counsel, Missouri Public Service Commission, No. 73-1 dated May 22, 1973. The conclusions reached in those opinions, in the light of the legislative and judicial history just outlined, are logical and convincing. We adopt those conclusions and hold that the Missouri Public Service Commission does not have jurisdiction to regulate the rates charged by Oregon to the City or residents of Forest City. n6 This alone prevented the trial court from acceding to Forest City's request that this case be transferred to the Commission.

n6 This interpretation also serves to avoid conflict with Sections 91.050 and 91.060 which are discussed below in part II of this opinion.

[**9]

As an alternative approach, Forest City argues that the Commission will take jurisdiction if so requested by Oregon, and Forest City urges that this court order Oregon to make such a request. The question immediately suggests itself whether the Commission could properly assume jurisdiction purely on consent of the parties, absent statutory authority. n7 Passing that question, Forest City cites no law or any appropriate theory upon which a court could make an order upon Oregon to request or consent to jurisdiction by the Commission, and we perceive no valid theory upon which this could be done.

n7 The trial court commented colorfully on that question as follows: "I am not aware of any concept of law that permits jurisdiction to be conferred by consent of the litigants. It has always been my understanding that jurisdiction is to a tribunal what beauty is to a woman; either she has it or she doesn't, and the lack of it can nowise be supplied by agreement on its desirability."

Forest City further suggests that [**10] the trial court could have appointed the Commission and referred this rate matter to it as a master under Rule 68.01. Aside from other questions, such action by the trial court would depend upon a showing of some authority in it to assume independent jurisdiction over this rate matter. This leads directly to a discussion of Forest City's other Point on Appeal.

II.

The Alleged Independent Judicial Jurisdiction to Review Reasonableness of the New Rates

Where, as is the situation here, no administrative body has jurisdiction of the rate regulation, the courts do have an equitable jurisdiction to prevent a municipality from enforcing public utility charges which are clearly, palpably and grossly unreasonable. 64 Am.Jur.2d, Public Utilities Section 128, p. 654; *City of Mt. Vernon v. Banks, 380 S.W.2d 268 (Ky. 1964); American Aniline Products v. City of Lock Haven, 288 Pa. 420, 135 A. 726 (1927).*

[*334] That principle, however, applies only when the city is acting in the nature of a public utility. A considerable line of cases hold that a city does so only to the extent that it supplies the utility service to its own in-

habitants, and that as to nonresidents, the municipality [**11] owes no duty of service, sells in purely private capacity on a purely contractual basis, and cannot be regulated as to the rates charged. 78 Am.Jr.2d, Waterworks and Water Companies Section 6, p. 896; *Childs v. City of Columbia, 87 S.C. 566, 70 S.E. 296 (1911); City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210 (1939); City of Colorado Springs v. Kitty Hawk Development Co., 154 Colo. 535, 392 P.2d 467* (banc 1964); *State of Florida v. City of Melbourne, 93 So.2d 371 (Fla. 1957); Davisworth v. City of Lexington, 311 Ky. 606, 224 S.W.2d 649 (1949); Adkisson v. Ozment, 55 Ill.App.3d 108, 370 N.E.2d 594, 12 Ill. Dec. 790 (1977); Atlantic Construction Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949).*

The philosophy of those cases has been adopted by the Missouri Legislature with respect to the sale of water by a municipality to nonresidents. Section 91.050 provides that any city may supply water from its waterworks to other municipal corporations for their use and the use of their inhabitants and "also to persons and private corporations for use beyond the corporate limits of such city, and to enter into contracts therefor, for such time, upon such [**12] terms and under such rules and regulations as may be agreed upon by the contracting parties." Similarly, Section 91.060 provides that any city may supply any other city "upon such terms and under such rules and regulations as it may deem proper." By these statutory provisions, the Missouri General Assembly clearly has left the sale of water by a city to nonresidents as a matter of voluntary contract, free from regulation.

Even aside from that, a rate does not become unreasonable or discriminatory simply because a municipality charges more to nonresidents than it does to its own inhabitants. 78 Am.Jur.2d, Waterworks and Water Companies Section 6, p. 896; 64 Am.Jur.2d, Public Utilities Section 120, p. 647; 94 C.J.S., Waters Section 297(b), p. 205; Annotation "Discrimination between property within and that outside municipality or other governmental district as to public service or utility rates," *4 A.L.R.2d 595,* Section 4, l.c. 599; *Guth v. City of Staples, 183 Minn. 552, 237 N.W. 411 (1931); State of Florida v. City of Melbourne, supra.*

III.

Other Unpreserved Argument

It must be repeated that Forest City makes no effort to enforce the contract of January 26, 1898, as [**13] such. However, in the argument portion of its brief, it speaks of the long-continued performance under the 1898 agreement as having acquired "the force of law" through operation of custom and usage. This argument is not within the scope of the Points Relied Upon, and therefore has not been properly presented for consideration. Rule 84.04(d). Nevertheless, it can be answered briefly that custom and usage can be effective only to help interpret a contract, not to create a contract. *State ex inf. Crow v. Atchison, T. & S.F. Ry. Co., 176 Mo. 687, 75 S.W. 776, 780* (banc 1903); *State ex rel. Chicago, M. & St.P. Ry. Co. v. Public Service Commission of Missouri, 269 Mo. 63, 189 S.W. 377* (banc 1916); *Leonard v. Dougherty, 221 Mo.App. 1056, 296 S.W. 263 (1927); Piper v. Allen, 219 S.W. 98 (Mo. App. 1920).* Moreover, it has been held that nonresidents of a municipality can obtain no rights to perpetual continuance of a given rate for a municipally offered utility service simply by reason of the fact of long performance by both parties under a contract specifying no termination date. *Childs v. City of Columbia, supra; Adkisson v. Ozment, supra.*

Affirmed.

All concur. [**14]

812 S.W.2d 827 printed in FULL format.

STATE OF MISSOURI, ex rel., CITY OF SPRINGFIELD, CITY OF FULTON and CITY OF GRANBY, Appellants, v. PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Respondent

No. WD 43828

Court of Appeals of Missouri, Western District

812 S.W.2d 827; 1991 Mo. App. LEXIS 894

June 11, 1991, Filed

SUBSEQUENT HISTORY: [**1]

Rehearing Overruled/Denied July 30, 1991.

PRIOR HISTORY:

Appeal from the Circuit Court of Cole County, Missouri; The Honorable James F. McHenry, Judge.

CORE TERMS: rulemaking, municipal, New Rules, notice, customer-owned, yard, customer, invalid, affirming, ordinances, prescribe, effected, political subdivision, rule prohibiting, customer-ownership, municipality, unlawfully, authorizes, effective, void, duty, leak, public service, public utility, retrospective, retroactive, sovereignty, taxation, Hancock Amendment, unconstitutional taking

COUNSEL: APPELLANT: Gary W. Duffy, Jefferson City, Missouri.

RESPONDENT: William Shansey, Jefferson City, Missouri.

JUDGES: Lowenstein, P.J., Turnage and Gary A. Fenner, JJ. All concur.

OPINIONBY: FENNER

OPINION: [*829] This is an appeal from a circuit court judgment affirming an Order of Rulemaking of the Respondent, Missouri Public Service [*830] Commission (Commission). The Commission's Order of Rulemaking in question here sets forth new and amended gas safety rules (New Rules). The appellants all operate municipal gas utilities which, in accordance with the language of § 386.310.1, RSMo Supp. 1990, are subject to the safety and health rulemaking authority of the Commission.

In this appeal, appellants argue that the New Rules are not applicable to them on constitutional grounds and because the Commission failed to follow the requisite statutory rulemaking process.

In their first point, appellants argue that the New Rules require either new activity or service or an increase in activity, or all of the same, in violation of the provisions [**2] of what is commonly known as the Hancock Amendment, consisting of Mo. Const. Art. X, §§ 16 through 24.

Appellants argue specifically that the New Rules are in violation of Mo. Const. Art. X, § 21, which provides as follows:

The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

A violation of Mo. Const. Art. X, § 21, exists only if both (1) a new or increased activity or service is required of a political subdivision by the state and (2) the political subdivision experiences increased costs in performing that activity or service. *Miller v. Director of Revenue, 719 S.W.2d 787, 788-89* (Mo. banc 1986).

There is no dispute that the New Rules increase the frequency of inspections, replacements, testing, [**3] record keeping and other activities of gas utilities, including municipal gas utilities, with increased cost to the utilities but without appropriation from the state to pay the increased cost. However, the operation of a gas utility is a discretionary function of a municipality which can also be undertaken by private interests. n1 It is not a service required of a municipality to be funded by tax dollars.

n1 Chapter 91, RSMo 1986, establishes authority for municipal ownership of utilities.

The purpose which appears in the whole plan of utility operations is to place municipal utilities on the same basis as investor owned utilities. *Pace v. City of Hannibal, 680 S.W.2d 944, 948* (Mo. banc 1984). A public utility, whether investor owned or publicly owned, requires a franchise to operate. Id.

Gas utilities are subject to regulation by the Public Service Commission. § 386.250(1) and (5); § 393.110 - 393.295, RSMo 1986. n2 Among its supervisory and regulatory functions, the Public Service Commission generally [**4] fixes rates for gas utilities. § 393.140(11); § 393.150. However, municipal utilities are free to determine and set rates without being subject to the rate making process of the Commission. *Shepherd v. City of Wentzville, 645 S.W.2d 130, 133 (Mo. App. 1982).*

n2 All statutory references are to RSMo 1986, unless otherwise specifically stated.

Municipal utilities are governed by a Board of Public Works pursuant to § 91.450, or as established by City Charter. The rate a governing body of a municipal utility is allowed to charge is not in the nature of taxation, which is a demand of a sovereignty; but is in the nature of a toll, which is a demand of a proprietorship. *St. Louis Brewing Ass'n v. City of St. Louis, 140 Mo. 419, 37 S.W. 525, 528 (Mo. 1896);* see also, *Shepherd v. City of Wentzville, 645 S.W.2d 130, 134 (Mo. App. 1982).* Taxes are enforced contribution from corporations, persons and property, levied by the state by virtue of its sovereignty, for the support of government and for all public [**5] needs. But utility rates, including those of a municipal utility, are imposed and collected merely as compensation to be paid for the commodity received by an individual customer [*831] of the utility. *St. Louis Brewing Ass'n v. City of St. Louis, 37 S.W. at 528.*

Operation of a municipal utility is not an activity required of government to serve public needs. It is a discretionary function often undertaken by private interests. Increased costs to a municipal utility are not a drain on general revenue, but are charges against the customers of the utility. The charges of a municipal utility are not in the nature of taxation.

The imposition by the Commission of new and amended safety rules, against municipal utilities, does not violate the Hancock Amendment even when the rules increase the utilities' activity, service and costs. The increased costs do not affect the municipality's tax structure by increasing the cost of operating government and impose no additional burden upon the taxpayers.

Appellants' first point is denied.

In their second point, appellants argue that the Commission acted unlawfully and the circuit court erred in affirming its decision in that the Commission's [**6] Order of Rulemaking requires appellants to undertake leak investigation surveys of customer-owned facilities not owned or installed by appellants and bans future installation of customer-owned service and yard lines.

Appellants argue first, under their second point, that requiring them to undertake leak investigation surveys of customer-owned lines is beyond the jurisdiction of the Commission.

A number of statutory sections address this issue. Section 386.250, RSMo Supp. 1990, subsections (1) and (5) provide, in pertinent part, that the jurisdiction, supervision, powers and duties of the Commission extend to the manufacture, sale or distribution of gas and to persons or corporations owning or controlling the same and to all public utility corporations. Section 386.250(6), RSMo Supp. 1990, specifically authorizes the adoption of rules which prescribe the conditions of rendering public service. Section 386.310, RSMo Supp. 1990, authorizes the Commission to promulgate safety rules effective against municipal gas systems and public utilities among others. In pertinent part, § 386.310.1, RSMo Supp. 1990, authorizes the Commission to ". . . require the performance of any other act which [**7] the health or safety of its employees, passengers, customers or the public may demand, ..."

Pursuant to the foregoing statutory sections, it is reasonable for the Commission to require gas utilities to inspect customer lines in the interest of public safety. The Commission acted within its statutory authority by so ordering.

Appellants next argue, under their second point, that the Commission was without authority to prohibit, as of the effective date of its New Rules, future customer-owned service and yard lines. Appellants argue that this rule conflicts with municipal ordinances which require customer-ownership of service lines, violates Article I, § 13, of the Missouri Constitution and is an unconstitutional taking of property.

As noted previously herein, the Commission has statutory authority to adopt safety rules effective against pub-

lic utilities in the interest of utility employees and customers. § 186.310.1, RSMo Supp. 1990. Duly promulgated rules of a state administrative agency have the force and effect of law. *Missouri National Education Association v. Missouri State Board of Mediation, 695 S.W.2d 894, 897* (Mo. banc 1985). Municipal ordinances regulating subjects, [**8] matters and things upon which there is a general law of the state must be in harmony with the state law. *Frank v. Wabash Railroad Company, 295 S.W.2d 16, 21 (Mo. 1956).*

The safety rules of the Commission take precedent over conflicting municipal ordinances. Appellants' argument that they are entitled to relief because of conflict between the New Rules and municipal ordinances is denied.

Under their second point, appellants argue further that the Commission's ban of customer-owned service and yard lines is in violation of the Constitution of Missouri, Art. I, § 13.

[*832] Article I, § 13, Mo. Const., prohibits the enactment of any law "retrospective in its operation." Retrospective or retroactive laws are generally defined as those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed. *Martin v. Schmalz, 713 S.W.2d 22, 23 (Mo. App. 1986).* (citations omitted.) A law is said to be retroactive only when it is applied to rights acquired prior to its enactment. Id.

The rule prohibiting customer-ownership of service [**9] and yard lines is applicable only from the effective date forward and does not violate Art. I, § 13, Mo. Const..

In the final argument, under their second point, appellants argue that the rule prohibiting customer-ownership of service and yard lines constitutes an unconstitutional taking of appellants' property. The only authority appellants cite for this argument is *State ex rel. Southwestern Bell Telephone Company v. Public Service Commission, 416 S.W.2d 109* (Mo. banc 1967).

In the Southwestern Bell case, the Supreme Court held that an order of the Commission directing the telephone company to provide service in an area where it had not professed to provide service was an unconstitutional taking of private property. The court reasoned that the company could not be required to use its property in a service to which the owner had not voluntarily dedicated it.

The Southwestern Bell case is clearly distinguishable from the case at bar in that appellants are not being required to provide service outside the area that they have sought the right to serve. In the case at bar, the Commission is exercising its authority to regulate the activities of appellants within their [**10] respective service areas.

Appellants' argument that the Commission's rule prohibiting future customer-owned service and yard lines constitutes an unlawful taking of appellants' property is without merit.

In their third point, appellants argue that the circuit court erred in affirming the Commission's decision because the Commission's Order of Rulemaking is void due to the Commission's failure to state an explanation of and the reasons for the proposed changes in the Notice of Proposed Rulemaking as required by § 536.021.2(1).

Section 536.021.1 requires that before making, amending or rescinding a rule the Commission must first file with the secretary of state a notice of proposed rulemaking. Section 536.021.2 requires that the notice of proposed rulemaking shall contain:

(1) An explanation of any new rule or any change in an existing rule, and the reasons therefor;

(2) The legal authority pursuant to which the rule is proposed to be made;

(3) The text of the entire rule proposed to be made . . .;

(4) The number and general subject matter of any rule proposed to be rescinded;

(5) Notice that anyone may file a statement in support of or in opposition to the [**11] proposed rulemaking . . .;

(6) Notice of the time and place of a hearing on the proposed rulemaking if a hearing is ordered, ...

The Commission proposed two Rules in the case at bar, 4 CSR 240-40.020 and 4 CSR 240-40.030. The Rules were prefaced with purpose sections as follows:

4 CSR 240-40.020 Incident and Annual Reporting Requirements

PURPOSE: This rule prescribes requirements and procedures for reporting certain natural gas related incidents and for filing annual reports. It applies to gas corporations and municipal gas systems subject to the safety jurisdiction of the Public Service Commission.

4 CSR 240-40.030 Safety Standards - Transportation of

Gas by Pipeline

PURPOSE: This rule prescribes minimum safety standards regarding the design, fabrication, installation, construction, metering, corrosion control, operation, maintenance, leak detection, repair [*833] and replacement of pipelines used for the transportation of natural and other gas.

The purpose sections of the proposed rules provided an explanation of the general subject matters covered by the rules and specified that the proposed rules related to safety practices and procedures. Furthermore, [**12] the purpose of the notice procedure for a proposed rule is to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification. *St. Louis Christian Home v. Missouri Commission On Human Rights, 634 S.W.2d 508, 515 (Mo. App. 1982).* The record does not reflect that appellants suffered any detriment in their ability to participate in or react to the rulemaking process as a result of their complaints under this point.

Appellants' third point is denied.

In their fourth point, appellants argue that certain of the provisions of the New Rules adopted by the Commission are unconstitutionally void for vagueness.

As previously noted in this opinion, duly promulgated rules of a state administrative agency have the force and effect of law. *Missouri National Education Association v. Missouri State Board of Mediation, 695 S.W.2d at 897.* A statute or law is presumed constitutional and will not be held otherwise unless it clearly contravenes some constitutional provision. *Prokopf v. Whaley, 592 S.W.2d 819, 824* (Mo. banc 1980). In order to have standing to challenge a statute or administrative rule on constitutional grounds, a party must show [**13] not only that the statute or rule is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement. *Harrison v. Monroe County, 716 S.W.2d 263, 266* (Mo. banc 1986).

Appellants argue that 14 separate provisions within the New Rules are unconstitutionally vague. Appellants do not represent that any of the "vague" provisions either have been or are threatened to be enforced against them to their detriment. At best, appellants express concern that they may be held to be in violation at some point in the future because they are not able to interpret and comply with the provisions of which they complain. Appellants have not shown that they have standing to attack the New Rules on constitutional grounds.

Appellants' fourth point is denied.

In their fifth point, appellants argue that the Commission acted unlawfully and the trial court erred by affirming the Commission's decision in that the Commission's Order of Rulemaking contains interpretations of law or policy as to certain provisions within the Order which interpretations are invalid. Appellants argue that the interpretations are invalid because they were not adopted [**14] as rules in accordance with § 536.021.

The power to make rules includes the power to alter them and to determine any reasonable policy of interpretation and application of such rules. *State ex rel. Dail v. Public Service Commission, 240 Mo. App. 250, 203 S.W.2d 491, 497 (Mo. App. 1947).* The Commission does not argue that its interpretations of certain of the New Rules rise to the level of rules themselves. The interpretations were provided in response to questions and concerns raised pursuant to the Commission's Notice of Proposed Rulemaking. The interpretations act as guidance to interested parties. The interpretations were not incorporated into the rules and do not constitute rules themselves. The fact that interpretations were provided in no way renders the New Rules invalid.

Appellants' fifth point is denied.

In their sixth and final point, appellants argue that the Commission acted unlawfully in adopting the New Rules and the circuit court erred in affirming the decision of the Commission because the Commission's Order of Rulemaking was invalid in that the Commission failed to send a copy of the Order of Rulemaking to all effected parties as required by § 386.490, RSMo [**15] 1986.

Several statutes are relevant to this point. First of all, § 386.490, RSMo 1986, relates to the procedure for contested hearings [*834] before the Commission. See §§ 386.390-386.610, RSMo 1986. Section 386.490.1, RSMo 1986, requires that orders of the Commission shall be served on every person or corporation to be effected thereby. The purpose of § 386.490.1, RSMo 1986, is to allow effected parties the opportunity to request rehearing and review of the Commission's Orders in accordance with the provisions of § 386.500, RSMo 1986 (Rehearing before commission) and § 386.510, RSMo 1986 (Review by circuit court).

Furthermore, § 386.610, RSMo 1986, provides that the provisions of Chapter 386, RSMo 1986, are to be liberally construed and that substantial compliance with the provisions of Chapter 386, RSMo 1986, is sufficient. On the other hand, § 536.021 relates specifically to the procedure applicable to state agencies when making, amending or rescinding rules.

A Rule is defined as an ". . . agency statement

of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of an [**16] agency." § 536.010. (4), RSMo 1986. The term "rule" as used in Chapter 536, RSMo 1986, does not include a determination, decision or order in a contested case. § 536.010(4)(d), RSMo 1986. A "contested case" is defined under § 536010(2), RSMo 1986, as "a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after a hearing."

In accordance with § 536.021.1, notice of proposed rulemaking and a subsequent order of rulemaking are to be published in the Missouri Register. Section 536.021.6, directs that rules of state agencies are void unless made in compliance with § 536.021.

The Commission complied with the statutory requirements applicable to notice of proposed rulemaking and for the subsequent order of rulemaking by publication of said notice and order in the Missouri Register as specifically required by § 536.021.1. The Commission was not required to send a copy of the Order of Rulemaking to all effected parties as argued by appellants.

Appellants' sixth point is denied. The judgment of the circuit court is affirmed.

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645 S.W.2d 130 printed in FULL format.

Charles M. M. Shepherd, Plaintiff-Appellant, v. The City Of Wentzville, Defendant-Respondent

No. 43915

Court of Appeals of Missouri, Eastern District

645 S.W.2d 130; 1982 Mo. App. LEXIS 3376

November 30, 1982

SUBSEQUENT HISTORY: [**1]

Motion for Rehearing Overruled Janury 14, 1983. Transfer Denied January 14, 1983. Application Denied February 23, 1983.

PRIOR HISTORY:

From the Circuit Court of St. Charles County

Civil Appeal

Judge Donald E. Dalton

DISPOSITION: Affirmed.

CORE TERMS: ordinance, multiple-unit, volume, gallons, water, classification, billing, dwelling, municipality, occupied, residential, multiple-complex, regressive, apartment, motels, conclusions of law, burden of proving, rates fixed, customer, users, differential treatment, single family, multiplied, accorded, residents, quotient, grossly, entity, hotels, sewer

COUNSEL: Charles M. Shepherd, Clayton, Missouri, Attorney for Appellant.

Robert M. Wohler, O'Fallon, Missouri, Attorney for Respondent.

JUDGES: Stewart, P.J., Stephan, Crandall, JJ..

OPINIONBY: STEWART

OPINION: [*132] Plaintiff challenges the denial of his petition for a declaratory judgment in which he sought to have two ordinances establishing utility rates of defendant City declared unreasonable, arbitrary and unconstitutional. The trial court entered judgment in defendant City's favor.

We affirm.

The City of Wentzville owns and operates a water and sewer system. Ordinance 695 sets the billing rate for city water using a regressive rate schedule, the cost per hundred gallons decreasing as the volume used increases. n1

n1 The quarterly water rate for city residents is $6.00 for the first 3,000 gallons; $0.08/100 gallons for the next 7,000 gallons; $0.07/100 gallons for the next 20,000 gallons; and $0.06/100 gallons thereafter.

[**2]

The regressive rate schedule applies to commercial and residential multiple-unit complexes and to single entities. The rate is applied differently, however, to "multiple-unit complexes."

"Multiple-unit complexes," as this ordinance is applied by the City, includes apartment houses and multi-business office buildings. Motels, laundromats and nursing homes are treated as single enterprises.

In billing multiple-unit complexes, the City divides the total water volume used in a complex by the number of occupied units served. This smaller, quotient volume is then treated as though it were the amount actually used by each unit and is applied to the rate schedule to establish the per unit charge. This charge is then multiplied by the number of units that were occupied during the billing quarter to establish the water bill for the entire complex, for which the complex owner is responsible.

The system results in a total bill for such multiple complexes which is based on the volume assessed to the individual units, low volumes to which the higher rates apply. The City thus precluded the more favorable charge multiple-unit complexes would pay if the regressive scale were applied to the total [**3] volume registered as is done with single entity users.

Ordinance 696 sets the City's sewer rates, comprised

of a basic charge of $1.50 assessed to all City residents plus the water volume they used times $0.05 per hundred gallons. A similar quotient volume formula is used to calculate the total charge for multiple-unit complexes, however since the ordinance uses a flat rate for sewer usage, the result is that multiple-unit complexes differ from single enterprises in that they pay a basic charge equal to $1.50 multiplied by the number of occupied units. Like the water service ordinance, 696 places responsibility for paying the utility bills on the complex owner.

Plaintiff owns Pinehill Apartments in Wentzville consisting of four buildings, each accommodating eight units. Thus plaintiff receives four separate water bills for each service period.

Plaintiff, by this action, seeks to have the two ordinances declared unreasonable, arbitrary and unconstitutional, in the differential treatment accorded multiple-unit complexes. The trial court denied the petition.

Plaintiff first contends that the trial court failed to honor his timely request for findings of fact and conclusions of law. [**4] We find no request for specific findings of fact and conclusions of law in the record before us as required by Rule 73.01.1(b). n2 The judgment however, does give a statement of the grounds for its decision which satisfies the requirements of Rule 73.01.1(b). Even if a request for specific findings of fact had been made the failure to make such findings is not reversible error. *First Fla. Bldg., Inc. v. Safari Systems, Inc., 570 S.W.2d 728, 730 (Mo.App. 1978).* We find no defect in the form of the judgment.

n2 Presently Rule 73.01(a)(2).

[*133] As we read plaintiff's principal point relied on, he complains that Ordinance 695 and Ordinance 696 provide for methods of charging for water and sewer service that are unreasonable, arbitrary and unconstitutional, in the differential treatment accorded multiple-unit complexes.

Municipal corporations that operate public utilities are not subject to the rate making process of the Public Service Commission. The courts, however, have equitable jurisdiction to prevent [**5] a municipality from enforcing public utility charges that are "clearly, palpably and grossly unreasonable." *Forest City v. City of Oregon, 569 S.W.2d 330, 335 (Mo.App. 1978).*

Although the issues specifically presented in this case have not been addressed by the courts of this state, there is abundant authority, some conflicting, in other jurisdictions.

The basic precepts enunciated by all jurisdictions are that the function of fixing rates and the determination of whether differences in rates between classes of customers are to be made, and the amount of differences, is a legislative function not a judicial function. There is a strong presumption that the rates fixed by the municipality are reasonable and the burden of proving that the rates fixed by the municipality are unreasonable is upon the party challenging the rates. *Lewis v. Mayor and City Council of Cumberland, 189 Md. 58, 54 A.2d 319, 323 (App. 1947); Gillam v. City of Fort Worth, 287 S.W.2d 494, 497 (Tex. Civ. App. 1956).* See also *Kliks v. Dalles City, 216 Or. 160, 335 P.2d 366 (1959).*

A municipality may classify its users for the purpose of fixing rates if the classification is reasonable and if there [**6] is no discrimination within the class. *Beauty Built Construction Corp. v. City of Warren, 375 Mich. 229, 134 N.W.2d 214, 218 (1965).*

Plaintiff here argues that his apartment buildings should be classified the same as motels or hotels. The effect of the classification made in this case is to treat each residential dwelling unit within the apartment complex as a single family dwelling. To treat the multiple-complex residential units, be they two family, eight family, or more, in the commercial classification with hotels, motels and tourist camps would discriminate against the single residential dwelling. It is true that not every tenant in plaintiff's complex uses the same amount of water but each uses water and has the benefit that arises from the use and availability of the plant and equipment.

This very issue has been faced by many jurisdictions and the majority has held that the classification of multiple-complex dwelling units with single family dwellings does not constitute unlawful discrimination. *Caldwell v. City of Abilene, 260 S.W.2d 712 (Tex. Civ. App. 1953); Oradell Village v. Township of Wayne, 98 N.J. Super. 8, 235 A.2d 905 (Ch. Div. 1967);* Gilliam v. [**7] City of Fort Worth, supra. n3

n3 But see *Kliks v. Dalles City, 216 Or. 160, 335 P.2d 366 (1959)* for the minority view.

We find the majority view to be persuasive and hold that the trial court did not err in holding that plaintiff did not carry the burden of proving that the classification of multiple-complex dwellings was "clearly palpable and grossly unreasonable." *Forest City v. City of Oregon, supra.*

Plaintiff would also argue that the rate charged plaintiff has no relation to the cost of service. Cost of service is but one consideration in the determination of the reasonableness of the rate. *Oradell Village v. Township of Wayne, supra, 235 A.2d at 907.* In any event plaintiff here has not undertaken to make proof of the cost of service and thus has failed to carry his burden on this issue.

Plaintiff also claims that he has been denied equal protection of the law because the terms of the ordinances are not defined and state no basis for their terms and classifications. An ordinance does [**8] not have to define each term nor does it have to state the underlying rationale for the adoption of the measure. Plaintiff cites no case where these requirements are made. The ordinances in question are not so indefinite [*134] as plaintiff would have us believe. It would be difficult and impractical to set out a comprehensive delineation of what uses constitute multiple-unit complexes. The determination of what comprises that term is best done on an ad hoc basis. Standards need not be set out in such a circumstance. See *Clay v. City of St. Louis, 495 S.W.2d 672 (Mo.App. 1973).* The ordinance sets out the rate to be charged as well as the billing procedure. The means adopted are sufficiently definite in terminology.

Plaintiff contends that the minimum charges made under the ordinances for each unit occupied during a quarter are improper, unlawful and unconstitutional. The primary issue raised under this point is that the ordinances to the extent of the minimum charges are taxes and as such the ordinances "violate the provisions of Article X, Section 3 of the Constitution of the State of Missouri in that such taxes are not uniform in the same class of subjects . . ." Plaintiff [**9] cites no cases in support of this or other contentions under this point. In any event, such charges are not taxes. *St. Louis Brewing Assn. v. City of St. Louis, 140 Mo. 419, 37 S.W. 525, 528 (1896).*

The ordinances here allow for adjustment in the billing when a unit within the complex is vacant for a billing quarter. The general rationale in the promulgation of minimum rates is that it is a service charge for making the service available to the customer. We find such a charge to be reasonable. See *Oradell Village v. Township of Wayne, supra.*

Other issues discussed in plaintiff's brief have been adequately covered by what we have said above.

Judgment affirmed.

All concur.

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not material here, and in any event did not become effective until August 13, 1978, after our preliminary writ issued.

The public interest in the public conduct of public business is declared by the Open Meetings Act, § 610.015, RSMo 1978, in the following language: (emphasis is ours)

"Except as provided [**8] in section 610.025, and except as otherwise provided by law, all public votes shall be recorded, and if a roll call is taken, as to attribute each 'yea' and 'nay' vote, or abstinence if not voting, to the name of the individual member of the public governmental body, and all public meetings shall be open to the public and public votes and public records shall be open to the public for inspection and duplication."

Comment on this statute by this court would be singularly inappropriate. In *Cohen v. Poelker, 520 S.W.2d 50, 52*[1] (Mo.banc 1975), our Supreme Court declared:

"The several sections of Chapter 610, considered together, speak loudly and clearly for the General Assembly that its intent in enacting the Sunshine Law, so-called was that all meetings of members of public governmental bodies (except those described in § 610.025) at which the peoples' business is considered must be open to the people and not conducted in secrecy, and also that the records of the body and the votes of its members must be open."

[*289] The court also held that the Open Meetings Act was a statute of general application, binding statewide at all levels of government, including [**9] constitutional charter cities. *Cohen v. Poelker, supra, 520 S.W.2d at 54.*

The statutes granting bargaining rights, of a sort, to public employees have a long and tortuous history which we need not restate. It is, however, clear that public employees' limited bargaining rights are constitutionally protected. In material part, § 105.510, RSMo 1978, V.A.M.S., provides: (our emphasis)

"Employees . . . of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through representative of their own choosing. . . ."

The nature and extent of public employees' negotiating rights have been developed in a number of cases, e.g., *State ex rel. O'Leary v. Missouri State Board of Mediation, 509 S.W.2d 84 (Mo.banc 1974); State ex rel. Missey v. City of Cabool, 441 S.W.2d 35 (Mo. 1969).* In *Curators of University of Missouri v. Public Service Employees Local No. 45, 520 S.W.2d 54 (Mo.banc 1975),* the Curators contended that the Public Sector Labor Law was not applicable to them because they are constitutionally vested with the power to govern the State [**10] University. Mo. Const. art. IX, § 9(a). Our Supreme Court held that application of the Public Sector Labor Law to the University did not represent an impermissible divestiture of the Curators' power to govern the University. Citing *Missey, supra, 441 S.W.2d at 41,* the court observed, *520 S.W.2d at 57.* (our emphasis)

"Sections 105.500 et seq., supra, do not purport to give to public employees the right of collective bargaining guaranteed by Section 29, Article I, of the 1945 Constitution to employees in private industry and in the sense that term is usually known with its attendant connotation of unfair labor practice for refusal by the employer to execute and adopt the agreement produced by bargaining . . . and the use of strike as a bargaining device constitutionally protected to private employees . . . but expressly denied . . . to public employees. The [public sector labor] act does not constitute a . . . bargaining away . . . of the legislative power of the public body and therefore does no violence to City of Springfield v. Clouse, supra 206 S.W.2d l.c. 543[4], 545-6[8, 9], because the prior discretion in the legislative body to adopt, modify or reject [**11] outright the results of the discussions is untouched. The public employer is not required to agree but is required only to 'meet, confer and discuss,' a duty already enjoined upon such employer prior to the enactment of [the Public Sector Labor Law] . . . ."

Nevertheless, the court held in terms, *520 S.W.2d at 57,* that the Public Sector Labor Law represents a statutory vehicle by which public employees may assert the rights given them by U.S. Const. Amend. I and Mo. Const. art. I, § 9. The court further held that when the employees' representative submits proposals and grievances relative to salaries and other conditions of employment, the public body must acknowledge such proposals and grievances and must discuss them with the bargaining representative. *Curators, supra, 520 S.W.2d at 57.* (our emphasis)

The authorities cited permit several conclusions. The Open Meetings Act declares public policy; it is a statute of general application. Nevertheless the act admits of exceptions, and the rights it confers are conferred upon the general public and not upon any particular segment or representative of the general public. The Public Sector Labor Law, in light of [**12] the Curators decision, also appears to be a statute of general application. It grants limited but constitutionally protected rights to public em-

n4 N.H. RSA 91-A:3(I) (Supp. 1973) then provided that all decisions made during executive session must be made available to the public at the termination of the session and that no contracts, appointments or other official actions would be made or taken in executive session.

Other decisions which support this position are *Bassett v. Braddock, supra, 262 So.2d 425, 426-428 (Fla. 1972); People v. Board of Education of Dist. [**17] 170 of Lee & Ogle Counties, 40 Ill.App.3d 819, 353 N.E.2d 147 (1976),* and *Port Townsend Publishing Co. v. Brown, 18 Wash.App. 80, 567 P.2d 664 (1977).* n5

n5 There are, of course, precedents supporting a different view. See: Annot., *38 A.L.R.3d 1070 (Supp. 1979)* at 42-44.

As noted, our Open Meetings Act admits of exceptions. § 610.025(4), RSMo 1978, V.A.M.S., specifically provides:

". . . meetings relating to the hiring, firing or promotion of personnel of a public governmental body may be a closed meeting, closed record, or closed vote." (our emphasis)

On trial, the relators vigorously argued that their negotiations with their employees came within the terms of this exception. The respondent's memorandum of July 18 indicates he construed the "hiring and firing" exception narrowly to apply only to discussions involving a particular person. While we respect the respondent's judgment, his construction of the "hiring and firing" exception is too narrow. Both *Curators, supra, 520 S.W.2d [**18] at 57,* and *Missey , supra, 441 S.W.2d at 43*[17], make it clear that a public employer has a duty to negotiate with its employees collectively, if the employees wish. We have the same view as the New Hampshire court: it is improbable that the General Assembly intended the Open Meetings Act to apply in such manner as to destroy the limited bargaining rights of public employees by exposing the public employees' thought-processes, and those of the employer, to the public eye and ear. Further, it must be borne in mind that the relators cannot, in any event, bind the City Council of Springfield by their negotiations. By the terms of § 16.7 of the City Charter, the relators are charged with operation of the city's utilities; they are granted the authority to hire such persons as are necessary to operate the utilities. The relators are the employer's representatives; they have the authority to negotiate, but again as *Curators, supra,* and *Missey, supra,* unmistakably hold, the legislative authority -- here the Council -- cannot be bound by the results of the relators' negotiations. When discussions by the negotiators are complete, the results are to be reduced to writing and presented [**19] to the Board of Public Utilities "for adoption, modification or rejection" pursuant to § 105.520, RSMo 1978, V.A.M.S. Whether the public interest requires that such adoption, modification or rejection or that subsequent consideration by the City Council be made in a public meeting are questions we are not now called upon to decide. The public interest does not require that the mechanisms of public sector collective bargaining be inhibited and eventually destroyed by requiring that the negotiations, or discussion about those negotiations, be conducted in public.

Our opinion has necessarily been somewhat diffuse. To sum up, we hold that in issuing his restraining order -- as amended -- enjoining relators individually or collectively [*292] from attending or participating in closed meetings to discuss wages or terms of employment with regard to employees as a group, respondent wholly exceeded his jurisdiction. Moreover, in enjoining relators as private persons from discussing such matters, the respondent wholly exceeded his jurisdiction. In these two respects, our preliminary rule in prohibition is made absolute. Nevertheless, as respondent observed in his memorandum, other issues [**20] remain in the case. As to those other issues, our preliminary rule is quashed, and it is ordered that respondent proceed to final adjudication of those issues without let or hindrance. In the exercise of discretion and pursuant to Rule 97.05, V.A.M.R., all costs are taxed to the relators.

FLANIGAN, C.J., and TITUS, BILLINGS and MAUS, JJ., CONCUR.

GREENE and PREWITT, JJ., not participating because not members of the court when the cause was submitted.

592 S.W.2d 285 printed in FULL format.

State ex rel. Board Of Public Utilities of the City Of Springfield, Missouri, and Del Caywood, Denton Smith, Nancy Hoflund, J. David Lages, Ransom Ellis, N. L. McCartney, Russell Harthcock and William E. Hoyer, individually and as members of the Board of Public Utilities, Relators, v. The Honorable John C. Crow, Judge, 31st Judicial Circuit, Respondent

No. 11119

Court of Appeals of Missouri, Southern District

592 S.W.2d 285; 1979 Mo. App. LEXIS 3135; 5 Media L. Rep. 2574

December 17, 1979

SUBSEQUENT HISTORY: [**1]

Motion for Rehearing Overruled, Transfer Denied January 16, 1980. Application Denied February 11, 1980.

PRIOR HISTORY:

Original Proceeding in Prohibition

DISPOSITION: Preliminary Rule Made Absolute in Part and Quashed in Part.

CORE TERMS: negotiation, public employees, bargaining, session, Open Meetings Act, wage, Public Sector Labor Law, public sector, collective bargaining, participating, public interest, hiring, constitutionally protected, attending, gathering, general public, public body, negotiator, grievances, charter, firing, general application, restraining order, closed session, open-meeting, negotiating, enjoining, adjourned, notice, salary

COUNSEL: Richard D. Crites, Daniel T. Ramsdell, Springfield, Missouri, Attorneys for Relator Board.

Robert W. Schroff, Springfield, Missouri, Attorney for Relators Individually.

Robert C. Fields, Springfield, Missouri, Attorney for Relator Hoyer.

Lincoln J. Knauer, Springfield, Missouri, Attorney for Respondent.

Aaron A. Wilson, Sam B. Mumma, Harry L. Browne, Howard F. Sachs, Kansas City, Missouri, Attorneys for City of Kansas City, amicus curiae.

JUDGES: Hogan, J. Flanigan, C.J., and Titus, Billings and Maus, JJ., concur. Greene and Prewitt, JJ., not participating because not members of the court when the cause was submitted.

OPINIONBY: HOGAN

OPINION: [*287] This is an original proceeding in prohibition. We are called on to decide whether the Open Meetings Act, §§ 610.010-610.030, RSMo 1978, V.A.M.S., requires that relators' bargaining sessions or their discussions of negotiations being held pursuant to the Public Sector Labor Law, §§ 105.500-105.530, RSMo 1978, V.A.M.S., [**2] be conducted as open meetings. We conclude it does not.

The cause came to us thus: On April 3, 1978, the members of the Springfield Board of Public Utilities (hereinafter the board) were negotiating with several labor unions representing their employees. No agreement had been reached. The board's chairman called a joint meeting of its "administrative committee" and its "executive committee". No public notice of the meeting was given. Eight members of the board and its principal negotiator attended the meeting. The status of the negotiations and the issues remaining in dispute were discussed. Apparently, no record of the meeting was kept.

On the following day, the board met again, this time to resume a meeting which had been adjourned at an earlier date. No public notice was given that the adjourned meeting would resume on April 4, but it stands conceded that the minutes of the adjourned meeting indicated it would resume on April 4. During this meeting the board members considered the use of a proposed pricing index and other data as possible bases for determining cost of living increases proposed by its employees. The matters discussed were live issues in the board's negotiations

[**3] with the unions.

At some point during the meeting of April 4, it was moved that the board go into closed session and the motion carried. A reporter employed by Springfield Newspapers questioned the propriety of closing the meeting and requested admittance; his request was denied. In closed session, the board discussed its employees' proposals with which it disagreed. The topics discussed were political activity of its employees, the data to be used in fixing wage rates, and, apparently, proposals dealing with arbitration and delegation of the board's legal authority to managerial employees. After 30 minutes in closed session, the board reopened the meeting and rejected a proposed quarterly cost of living index and a pricing index as data to be used in negotiation.

Shortly thereafter Springfield Newspapers, Inc., as plaintiff, filed a petition for injunctive relief in the Circuit Court of Greene County. The respondent granted a restraining order enjoining the relators individually and as the Springfield Board of Public Utilities from: 1) holding meetings or gathering together to discuss wages and terms of employment with regard to public employees without adequate and timely public [**4] notice of such meetings or gatherings; and 2) adjourning, recessing or closing parts of public meetings to "discuss . . . the business of the public, and especially as it pertains to wages and working conditions of public employees." This order, dated April 14, 1978, also restrains the members of the board, as individual persons, "from attending or participating in such [sic] closed sessions."

On April 20, 1978, the respondent heard evidence and the next day modified his restraining order so as to enjoin relators ". . . from holding meetings or gathering together to discuss wages and terms of employment with regard to public employees as a group without adequate and timely public notice of such meetings or gatherings." The modified order further enjoined ". . . the individual members . . . from attending or participating in closed sessions at which wages and terms of employment with regard to public employees as a group are discussed." The respondent heard further evidence on April 20; subsequently he notified counsel of his findings and by letter advised all parties that he would, unless prohibited from doing so, enter a temporary injunction which would restrain the relators in [**5] their capacity as board members from attending or participating in closed sessions in which the wages and terms of employment of its employees as a group were to be discussed. On July 28, [*288] 1978, relators filed their petition for a writ of prohibition here. A majority of the court believed that the respondent had misconstrued the Open Meetings Act; all considered that because violations of injunctive orders are punishable by attachment for contempt, Rule 92.15, V.A.M.R., respondent was about to effect a continuing state of "confrontation" between the Circuit Court of Greene County and the Springfield Board of Public Utilities. Our preliminary writ ran, perhaps too broadly. The cause has been briefed and argued to the whole court.

A preliminary word of limitation seems appropriate. Counsel's attention was called to the rule that our factual inquiry is limited in prohibition, and to the rule that prohibition is not available to correct errors which may be corrected on appeal. *State ex rel. W. A. Ross Const. Co. v. Skinker, 341 Mo. 28, 32-33, 106 S.W.2d 409, 411-412*[4, 5] [6] (1937); *State ex rel. Specialty Foam Products v. Keet, 579 S.W.2d 650, 653 (Mo.App. 1979)*. [**6] Nevertheless, our files contain an incredible number of motions, suggestions and exhibits of various species, even a partial transcript. An amicus brief has been filed. Such a superfluity of marginally relevant matter serves only to obscure the real question at issue. This is not an appeal nor a proceeding for a declaratory judgment and it is not our function to deal with issues which may be resolved in the trial court and orderly determined on appeal. We consider only those matters essential to a disposition of the cause.

On the merits, we reject out of hand the relators' contention that as the Springfield Board of Public Utilities, they are not a "public governmental body" within the intent of § 610.010(2), RSMo 1978. n1 By virtue of §§ 16.6 and 16.7 of the Springfield City Charter, the relators hold all the public utilities of the city in trust for the citizens of Springfield and operate those utilities for their benefit. Relators' emphasis on the distinction between "governmental" and "proprietary" activities is important in tort cases, but here it has no significance. The functions exercised by the relators, for our purposes in this cause, are governmental functions. See, e.g., [**7] *Lober v. Kansas City, 74 S.W.2d 815, 822-823*[11] (Mo. 1934). The real issue before us is whether the statute opening the conduct of public business to the general public was meant to accommodate the constitutionally protected rights granted to public employees by the present Public Sector Labor Law. These two interests may be briefly contrasted, bearing in mind that we are firmly held and bound by the last controlling decision of our Supreme Court. Mo. Const. art. V, § 2; *Pitts v. Malcolm Bliss Mental Health Center, 521 S.W.2d 501, 503*[1, 2] (Mo.App. 1975).

n1 We are aware that the Open Meetings Act was amended by the 79th General Assembly in 1978. Laws of Mo. 1978 at 994-995. This amendment is

not material here, and in any event did not become effective until August 13, 1978, after our preliminary writ issued.

The public interest in the public conduct of public business is declared by the Open Meetings Act, § 610.015, RSMo 1978, in the following language: (emphasis is ours)

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The nature and extent of public employees' negotiating rights have been developed in a number of cases, e.g., *State ex rel. O'Leary v. Missouri State Board of Mediation, 509 S.W.2d 84 (Mo.banc 1974); State ex rel. Missey v. City of Cabool, 441 S.W.2d 35 (Mo. 1969).* In *Curators of University of Missouri v. Public Service Employees Local No. 45, 520 S.W.2d 54 (Mo.banc 1975),* the Curators contended that the Public Sector Labor Law was not applicable to them because they are constitutionally vested with the power to govern the State [**10] University. Mo. Const. art. IX, § 9(a). Our Supreme Court held that application of the Public Sector Labor Law to the University did not represent an impermissible divestiture of the Curators' power to govern the University. Citing *Missey, supra, 441 S.W.2d at 41,* the court observed, *520 S.W.2d at 57.* (our emphasis)

"Sections 105.500 et seq., supra, do not purport to give to public employees the right of collective bargaining guaranteed by Section 29, Article I, of the 1945 Constitution to employees in private industry and in the sense that term is usually known with its attendant connotation of unfair labor practice for refusal by the employer to execute and adopt the agreement produced by bargaining . . . and the use of strike as a bargaining device constitutionally protected to private employees . . . but expressly denied . . . to public employees. The [public sector labor] act does not constitute a . . . bargaining away . . . of the legislative power of the public body and therefore does no violence to City of Springfield v. Clouse, supra 206 S.W.2d l.c. 543[4], 545-6[8, 9], because the prior discretion in the legislative body to adopt, modify or reject [**11] outright the results of the discussions is untouched. The public employer is not required to agree but is required only to 'meet, confer and discuss,' a duty already enjoined upon such employer prior to the enactment of [the Public Sector Labor Law] . . . ."

Nevertheless, the court held in terms, *520 S.W.2d at 57,* that the Public Sector Labor Law represents a statutory vehicle by which public employees may assert the rights given them by U.S. Const. Amend. I and Mo. Const. art. I, § 9. The court further held that when the employees' representative submits proposals and grievances relative to salaries and other conditions of employment, the public body must acknowledge such proposals and grievances and must discuss them with the bargaining representative. *Curators, supra, 520 S.W.2d at 57.* (our emphasis)

The authorities cited permit several conclusions. The Open Meetings Act declares public policy; it is a statute of general application. Nevertheless the act admits of exceptions, and the rights it confers are conferred upon the general public and not upon any particular segment or representative of the general public. The Public Sector Labor Law, in light of [**12] the Curators decision, also appears to be a statute of general application. It grants limited but constitutionally protected rights to public em-

ployees. Public employees are guaranteed the right to express their grievances and make their proposals to their employer's representative. All open-meeting legislation involves the accommodation of differing [*290] interests, and, to reiterate, our problem is to determine how the General Assembly meant to deal with the negotiating rights of public employees when it enacted the Open Meetings Act in 1973. In determining legislative intent, it is appropriate to consider the history of a statute, the presumption that the General Assembly had knowledge of the general law, the surrounding circumstances and the purpose to be accomplished. *Person v. Scullin Steel Company, 523 S.W.2d 801, 803*[1] (Mo.banc 1975); *Wilson v. McNeal, 575 S.W.2d 802, 810*[10] (Mo.App. 1978). A further pertinent rule is that statutes which appear to conflict should be reconciled and harmonized, if possible, with a view to effecting the legislative purpose of both. *King v. Swenson, 423 S.W.2d 699, 708*[18] (Mo.banc 1968); *Flarsheim v. Twenty Five [**13] Thirty Two Broadway Corp., 432 S.W.2d 245, 251*[4] (Mo. 1968).

We have no explicit guide to the General Assembly's intent in enacting the Open Meetings Act; in enrolled form, the bill appears to have been a conference committee substitute. Laws of Mo. 1973-1974 at 502-504. There is, however, nothing in the history of "Open Meetings" or "Sunshine" or "Freedom of Information" legislation which indicates the public interest is best served by public participation in public-sector collective bargaining. A recent thorough study indicates that the federal government and all fifty states have legislation providing that some segments of the government must open some or all of their meetings to public observation, but concludes that "[collective] bargaining negotiations cannot effectively be carried out if open to the public." n2 Professor Douglas Wickham, an advocate of open-meeting laws, now calls for acknowledgment that ". . . open-meeting legislation involves the reconciliation of serious value conflicts . . ." and argues that courts should recognize ". . . the infeasibility of conducting collective bargaining negotiations in public. The give and take of compromise involves too [**14] much loss of face to expect the participants to bargain freely before outside observers." n3

n2 Statutory Comment, Government in the Sunshine Act: A Danger of Overexposure, *14 Harv.J.Legis. 620, 623, 630 (1977).*

n3 Wickham, Tennessee's Sunshine Law: A Need for Limited Shade and Clearer Focus, *42 Tenn.L.Rev. 557, 564-565 (1975).*

Illustrative decisions from other jurisdictions are, to some degree, persuasive. In *Talbot v. Concord Union School District, 114 N.H. 532, 323 A.2d 912 (1974),* a newspaper reporter sought to enjoin a school district from closing and excluding him and the public from a collective bargaining session concerning salary scales, fringe benefits and other related matters. The bargaining referred to was being conducted by committees which had no authority to bind the parties. The results of the negotiations were received and voted upon by the board in open session. At the time, the New Hampshire public sector labor law permitted negotiation but forbade strikes by public employees. [**15] Timberlane *Regional School Dist. v. Timberlane Regional Education Ass'n., 114 N.H. 245, 317 A.2d 555, 557 (1974).* New Hampshire's "Right to Know Law" then in effect, N.H. RSA 91-A:3(II) excepted discussions involving:

"(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigating of any charges against him, unless the employee affected requests an open meeting.
(b) The hiring of any person as a public employee. . . ."

The trial court refused injunctive relief, and on appeal, the Supreme Court of New Hampshire affirmed, stating, *323 A.2d at 913-914*[2]:

"There is nothing in the legislative history of the Right to Know Law to indicate that the legislature specifically considered the impact of its provisions on public sector [collective] bargaining. However, it is improbable that the legislature intended the law to apply in such a fashion as to destroy the very process it was attempting to open to the public. . . .

* * *

[*291] We agree with the Florida Supreme Court 'that meaningful collective bargaining . . . would be destroyed if full publicity were accorded at each step of [**16] the negotiations' (*Bassett v. Braddock, 262 So.2d 425, 426 (Fla. 1972))* [sic] and hold that the negotiation sessions between the school board and union committees are not within the ambit of the Right to Know Law. However, in so ruling, we would emphasize that these sessions serve only to produce recommendations which are submitted to the board for final approval. The board's approval must be given in an open meeting in accordance with RSA 91-A:3 (Supp. 1973), n4 thus protecting the public's right to know what contractual terms have been agreed upon by the negotiators."

n4 N.H. RSA 91-A:3(I) (Supp. 1973) then provided that all decisions made during executive session must be made available to the public at the termination of the session and that no contracts, appointments or other official actions would be made or taken in executive session.

Other decisions which support this position are *Bassett v. Braddock, supra, 262 So.2d 425, 426-428 (Fla. 1972); People v. Board of Education of Dist. [**17] 170 of Lee & Ogle Counties, 40 Ill.App.3d 819, 353 N.E.2d 147 (1976),* and *Port Townsend Publishing Co. v. Brown, 18 Wash.App. 80, 567 P.2d 664 (1977).* n5

n5 There are, of course, precedents supporting a different view. See: Annot., *38 A.L.R.3d 1070 (Supp. 1979)* at 42-44.

As noted, our Open Meetings Act admits of exceptions. § 610.025(4), RSMo 1978, V.A.M.S., specifically provides:

". . . meetings relating to the hiring, firing or promotion of personnel of a public governmental body may be a closed meeting, closed record, or closed vote." (our emphasis)

On trial, the relators vigorously argued that their negotiations with their employees came within the terms of this exception. The respondent's memorandum of July 18 indicates he construed the "hiring and firing" exception narrowly to apply only to discussions involving a particular person. While we respect the respondent's judgment, his construction of the "hiring and firing" exception is too narrow. Both *Curators, supra, 520 S.W.2d [**18] at 57,* and *Missey , supra, 441 S.W.2d at 43*[17], make it clear that a public employer has a duty to negotiate with its employees collectively, if the employees wish. We have the same view as the New Hampshire court: it is improbable that the General Assembly intended the Open Meetings Act to apply in such manner as to destroy the limited bargaining rights of public employees by exposing the public employees' thought-processes, and those of the employer, to the public eye and ear. Further, it must be borne in mind that the relators cannot, in any event, bind the City Council of Springfield by their negotiations. By the terms of § 16.7 of the City Charter, the relators are charged with operation of the city's utilities; they are granted the authority to hire such persons as are necessary to operate the utilities. The relators are the employer's representatives; they have the authority to negotiate, but again as *Curators, supra,* and *Missey, supra,* unmistakably hold, the legislative authority -- here the Council -- cannot be bound by the results of the relators' negotiations. When discussions by the negotiators are complete, the results are to be reduced to writing and presented [**19] to the Board of Public Utilities "for adoption, modification or rejection" pursuant to § 105.520, RSMo 1978, V.A.M.S. Whether the public interest requires that such adoption, modification or rejection or that subsequent consideration by the City Council be made in a public meeting are questions we are not now called upon to decide. The public interest does not require that the mechanisms of public sector collective bargaining be inhibited and eventually destroyed by requiring that the negotiations, or discussion about those negotiations, be conducted in public.

Our opinion has necessarily been somewhat diffuse. To sum up, we hold that in issuing his restraining order -- as amended -- enjoining relators individually or collectively [*292] from attending or participating in closed meetings to discuss wages or terms of employment with regard to employees as a group, respondent wholly exceeded his jurisdiction. Moreover, in enjoining relators as private persons from discussing such matters, the respondent wholly exceeded his jurisdiction. In these two respects, our preliminary rule in prohibition is made absolute. Nevertheless, as respondent observed in his memorandum, other issues [**20] remain in the case. As to those other issues, our preliminary rule is quashed, and it is ordered that respondent proceed to final adjudication of those issues without let or hindrance. In the exercise of discretion and pursuant to Rule 97.05, V.A.M.R., all costs are taxed to the relators.

FLANIGAN, C.J., and TITUS, BILLINGS and MAUS, JJ., CONCUR.

GREENE and PREWITT, JJ., not participating because not members of the court when the cause was submitted.

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932 S.W.2d 400 printed in FULL format.

THE MISSOURI MUNICIPAL LEAGUE, et al., Appellants, v. THE STATE OF MISSOURI AND THE MISSOURI SAFE DRINKING WATER COMMISSION, Respondents.

No. 78567

SUPREME COURT OF MISSOURI

932 S.W.2d 400; 1996 Mo. LEXIS 63

October 22, 1996, FILED

PRIOR HISTORY: [**1] APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY. The Honorable Byron L. Kinder, Judge.

DISPOSITION: The judgment is reversed.

CORE TERMS: testing, water, Hancock Amendment, supplier, political subdivision, general assembly, municipality, proprietary, drinking water, proportion, financed, regulations, laboratory, discretionary, public water, effective, Federal Safe Drinking Water Act, federal law, mandatory, summary judgment, service required, free of charge, solid waste, enact, join, safe

COUNSEL: APPS: Patrick Cronan, Columbia, Missouri.

RESPS: Honorable Jeremiah W. (Jay) Nixon, Attorney General, Joseph P. Bindbeutel, Assistant Attorney General, Robert C. Cook, Assistant Attorney General, Jefferson City, Missouri.

JUDGES: Ann K. Covington, Judge. All Concur.

OPINIONBY: ANN K. COVINGTON

OPINION:

[*401] The Missouri Municipal League filed suit against the State of Missouri and the Missouri Safe Drinking Water Commission claiming that section 640.100.4, RSMo Supp. 1992 n1, violated the Hancock Amendment. The Hancock Amendment prohibits the state from reducing the state financed proportion of any required activities or services. Mo. Const., art. X, § 21. Section 640.100.4, RSMo Supp. 1992, requires public water suppliers to pay fees for laboratory services and program administration. At issue is whether water testing is a required activity of a political subdivision. The trial court granted summary judgment in favor of the State. The Missouri Municipal League appealed. The judgment of the trial court is reversed.

n1 Section 640.100.4, RSMo Supp. 1992, is currently codified in section 640.100.3, RSMo Supp. 1995.

[**2]

The facts are not in dispute. The State of Missouri has monitored public drinking water since 1919. § 5790, RSMo 1919. The general assembly authorized the state board of health to enact and enforce regulations to ensure safe drinking water. Until 1978, Missouri law required water suppliers to pay testing costs. In 1978, the general assembly enacted Senate Bill 509, the "Missouri Safe Drinking Water Act" ("the Act"). §§ 640.100 to 640.140, RSMo 1978. Effective on August 1, 1978, the Act gave the state the authority to enforce state laws for public drinking water. Section 640.100 required the state to enact rules and regulations for testing of public drinking water. Section 640.100.4 provided that the division of health "shall" provide testing free of charge. § 640.100.4, RSMo 1978.

On November 4, 1980, the people of Missouri amended the Missouri Constitution with the passage of the Hancock Amendment. The Hancock Amendment is codified in article X, sections 16 through 24 of the Missouri Constitution. Section 21 makes it unconstitutional for the state to reduce "the state financed proportion of the costs of any existing activity or service required of counties and other political [**3] subdivisions" as of the effective date of the amendment. Mo. Const., art. X, § 21.

In 1982, the general assembly amended § 640.100.4 to require the Department of Natural Resources to collect fees to cover the reasonable costs of laboratory services and program administration (LSPA fees). The water supplier is required to pay LSPA fees even if the water supplier is not using the state's services. Section

640.100.4 allows each public water supplier either to send its samples to the state for testing or to obtain an analysis from a certified laboratory. At the time this suit was filed, section 640.100.4 was codified at section 640.100.4, RSMo Supp. 1992.

In 1989, in response to the Federal Safe Drinking Water Act, the general assembly amended the Act to include a requirement for annual testing of all contaminants addressed in the federal law. The testing requirement is currently codified in section 640.100.3, RSMo Supp. 1995.

In 1994, the Safe Drinking Water Commission promulgated LSPA fee regulations. 10 CSR 60-16.030. Since promulgation of 10 CSR 60-16.030, the state funds approximately eighty-eight percent of the costs of water testing and program administration and the political [**4] subdivisions twelve percent. On the date the Hancock Amendment became effective, the state provided water testing without charge to all public water suppliers.

Missouri Municipal League contends that section 640.100.4, RSMo Supp. 1992, and 10 CSR 60-16.030 violate Missouri Constitution, article X, section 21, which provides in pertinent part, "The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions." This Court agrees.

Water testing was an existing activity at the time the Hancock Amendment was enacted. § 640.100.4, RSMo 1978. The state has reduced the state financed proportion of the costs of water testing. In 1980, section 640.100.4 required the state to provide water testing free of charge. § 640.100.4, RSMo 1978. [*402] In 1982, the general assembly amended section 640.100.4 to require water suppliers to pay the costs of testing. Requiring water suppliers to pay the cost of testing, therefore, constitutes a reduction in the state financed proportion of the costs of water testing.

The issue is whether water testing is required of a political subdivision. [**5] Section 640.100.4 provides that the department "shall" conduct water testing. In Farmers & Merchants Bank and Trust Co. v. Director of Revenue, this Court stated that whether "shall" is mandatory or discretionary is a function of context. *896 S.W.2d 30, 32* (Mo. banc 1995). "Shall" is mandatory if the legislature "includes a sanction for failure to do that which 'shall' be done." *Id. at 33.* In the present case, water testing is clearly required because the state has mandated that testing "shall" be done to comply with both state and federal regulations. § 640.120, RSMo 1994. The Department "shall" collect fees for laboratory testing and program administration. § 640.100.4, RSMo Supp. 1992. If a municipality does not have its water tested, it is subject to fines or loss of its operating permit. §§ 640.125, 640.130, RSMo 1994; 10 CSR 60-16.030. Water testing is a required activity.

The State nevertheless contends that because providing water is a discretionary activity, water testing is not "required" of a political subdivision. The State relies on State ex rel. City of Springfield v. Missouri Pub. Serv. Comm'n for the proposition that where a city is performing a discretionary [**6] function, any law that results in an increase in cost to the city relating to that function is not in violation of *Hancock. 812 S.W.2d 827 (Mo. App. 1991).* In City of Springfield, the City argued that new gas safety rules imposed by the Missouri Public Service Commission violated section 21 by requiring a new or increased activity of the City. The Missouri Court of Appeals, Western District, held that providing gas was a discretionary function of municipalities; therefore, the new rules did not violate section 21.

This Court disagrees with the rationale of the court of appeals in City of Springfield, finding the rationale of Loving v. City of St. Joseph more persuasive. *753 S.W.2d 49 (Mo. App. 1988).* In Loving, the court of appeals stated that the "distinction between governmental and proprietary functions has [*403] little, if any, application outside of the tort liability of municipalities." *Id. at 51.* The court of appeals went on to point out that article X, section 22, does not distinguish between governmental and proprietary activities. Section 22 prohibits the levying of "any tax, license or fees." Similarly, in the present case, section 21 addresses [**7] "any existing activity or service" making no distinction between governmental and proprietary activities. Upholding the governmental/proprietary distinction allows the state to characterize many activities of municipalities as "proprietary," thus, not "required of a political subdivision." The distinction allows the government to thwart the purpose of the Hancock Amendment. Once the state imposes a requirement on a political subdivision, it makes no difference whether the underlying service is one traditionally performed by the government. Governmental/proprietary distinctions are abolished in article X, section 21, cases. City of Springfield is overruled.

The State further argues that the water testing is not required of a political subdivision by analogizing to *City of Jefferson v. Missouri Dep't of Natural Resources, 863 S.W.2d 844* (Mo. banc 1993). City of Jefferson is not on point. In City of Jefferson, several municipalities submitted that Senate Bill 530 required them to join

solid waste management districts in violation of section 21. This Court held that there was no express statutory language requiring a municipality to join a solid waste management district. [**8] *Id. at 847.* In City of Jefferson, it was unnecessary for this Court to reach the issue presented here.

As a final attempt to support the trial court's grant of summary judgment, the State asserts that federal law "preempts" the field of public drinking water. As best can be discerned, the State's argument is that because section 640.100.4 serves to enforce the requirements of the Federal Safe Drinking Water Act, section 640.100.4 is not subject to the Hancock Amendment. Certainly the federal government has preempted the area of standards for safe drinking water. *Mattoon v. City of Pittsfield, 980 F.2d 1, 4 (1st Cir. 1992).* The State, however, confuses standards with the enforcement of standards, which is specifically left to the states. *42 U.S.C.A. § 300g-3*(e). Enactments of the general assembly, including section 640.100.4, must conform to the requirements of the Missouri Constitution.

In sum, section 640.100.4 reduces the state financed proportion of the costs of water testing, an existing activity required of counties and other political subdivisions. Section 640.100.4, and consequently, 10 CSR 60-16.030, violate article X, section 21 of the Missouri Constitution, [**9] as applied to counties and political subdivisions of the state. The judgment is reversed.

Ann K. Covington, Judge

All Concur.

753 S.W.2d 49 printed in FULL format.

Kim Loving and Cathy Loving, Appellants, v. City Of St. Joseph, Missouri and St. Joseph Tennis Foundation, Respondents

No. WD 39991

Court of Appeals of Missouri, Western District

753 S.W.2d 49; 1988 Mo. App. LEXIS 672

May 10, 1988, Filed

SUBSEQUENT HISTORY: [**1]

Motion History: Rehearing Overruled June 28, 1988. Transfer Denied July 26, 1988.

PRIOR HISTORY:

APPEAL FROM THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI, HONORABLE MERRILL M. STEEB, JUDGE.

CORE TERMS: tennis, proprietary, cause of action, constitutional provision, municipal, instrumentality, municipality, involuntary, ordinance, levied, evade, swimming pool, fees paid, collected, pled, declaratory judgment, discretionary, transparent, recurring, lease

COUNSEL: Kim Loving, St. Joseph, Missouri, Appellant.

George S. Murray, Assistant City Attorney, St. Joseph, Missouri, (for City of St. Joseph).

Ronald S. Reed, Jr., St. Joseph, Missouri, (for St. Joseph Tennis Foundation), Respondent.

JUDGES: Manford, P.J., William E. Turnage and Covington, JJ.

OPINIONBY: TURNAGE

OPINION: [*50] Kim Loving and his wife, Cathy, filed suit against the City of St. Joseph and the St. Joseph Tennis Foundation seeking a declaratory judgment that fees charged for the use of municipal tennis courts were contrary to Article X, Section 22 of the Missouri Constitution. The court dismissed the cause for failure to state a cause of action upon which relief could be granted. Reversed and remanded.

The Lovings alleged that they were residents and taxpayers of the City of St. Joseph and that the City is a municipal corporation. The St. Joseph Tennis Foundation is a not-for-profit corporation. The petition alleged that the City is the owner of the Noyes Tennis Complex and that there [**2] was no fee charged for the use of the tennis courts located in the Noyes Complex when Article X, Section 22 of the Constitution was adopted on November 3, 1980.

The petition alleged that in May of 1987 the City Council authorized the city manager to enter into an agreement with the Foundation by which the Foundation was granted the right to manage and supervise the Noyes Tennis Complex. It was alleged that the agreement contained a schedule of fees for the use of the complex by members of the public and that the Foundation was required to collect such fees and remit a portion to the City. The petition alleged that the ordinance authorizing the agreement was passed for the purpose of raising revenue for the City and was a transparent attempt to evade the prohibition of Article X, Section 22 on the imposition of new fees by the City without a vote of the people.

It was further alleged that in May of 1987 the Foundation began the management of the Noyes Complex and imposed a fee on all persons using the complex. The petition prayed for a declaratory judgment to declare the ordinance void and to enjoin the City and the Foundation from charging a fee for the use of the tennis courts in [**3] the complex. The prayer contained a request that the City and the Foundation refund all fees collected for the use of the complex.

Loving contends the petition pleaded a cause of action when it alleged that the City, through its agreement with the Foundation, levied a fee for the use of the tennis complex without voter approval, contrary to Article X, Section 22. The city responds that the fee was levied by the Foundation and not the City and that, therefore, the constitutional ban does not apply because the constitution only forbids political subdivisions and not private groups or corporations from imposing a fee.

The agreement between the City and the Foundation provided that the Foundation would charge "proposed fees" for the use of the tennis courts in the Noyes Complex. The parties agree that the agreement between the City and Foundation did not constitute a lease but was simply an agreement by which the Foundation operated the tennis complex for the City. The Foundation was to handle the daily operation of the complex, collect the fees, and maintain accurate records. Any fees above the cost incurred by the Foundation were to be divided equally with the City.

The allegations [**4] of the petition are taken as true for the purpose of deciding whether or not the petition states a cause of action. It appears from the petition that the Foundation was nothing more than the agent or instrumentality through which the City charged fees for the privilege of playing tennis at the complex. Such allegation would support a finding that the Foundation was the mere agent of the City. However, the City contends that the Foundation collected the fees. *Lawrence v. Hancock, 76 F. Supp. 1004, 1008*[4] (S.D. W. Va. 1948), held that a lease of a municipal swimming pool constituted the lessee as a mere agent [*51] or instrumentality through which the city operated the swimming pool for the purpose of excluding blacks. The court held that justice would be blind if it failed to detect the real purpose of the effort by the city to clothe a public function with the mantle of private responsibility. The petition alleges that the purpose here was to evade the constitutional bar to collect fees.

Such attempts at deception are as old as recorded history. The City contends the fees were collected by the Foundation and not by the City. This is reminiscent of the story of Jacob [**5] and Esau. Jacob clothed himself in his brother's clothing and put on goat skin gloves to deceive his father, Isaac. Isaac was suspicious and uttered the well known phrase, "The voice is Jacob's voice but the hands are the hands of Esau." n1 Unlike Isaac, this court can see that the hands collecting the fees were those of the City and not the Foundation, according to the allegations in the petition.

n1 Genesis 27:22.

The Constitution would be impotent indeed if such a transparent effort could succeed in defeating a constitutional provision. In *City of Meadville v. Caselman, 240 Mo. App. 1220, 227 S.W. 2d 77, 80*[4] (Mo. App. 1950), this court quoted from *City of Washington v. Reed, 229 Mo.App. 1195, 70 S.W. 2d 121, 124 (1934),* the familiar maxim that the City could not do indirectly what it may not do directly. The City may not collect the fee itself, so it cannot do so through an agent.

The City was expressly prohibited by the Constitution from imposing a fee for the use of the tennis complex without [**6] a vote of the people when such a fee was not in effect at the time the constitutional provision was passed. The petition alleges that the City violated this provision even though it attempted to hide such violation through its agreement with the Foundation. n2 Thus, the allegations that the City entered into the agreement in an attempt to get around the provisions of Article X, Section 22 stated a cause of action.

n2 In argument before this court, counsel for the City candidly admitted that the agreement with the Foundation was an attempt to circumvent the constitutional provision.

The City argues that if this court determines that the Foundation was the mere instrumentality of the City and that the collection of fees is prohibited by the Constitution, such prohibition should not extend to the use of the tennis courts because this is a proprietary act of the City. In *Roberts v. McNary, 636 S.W. 2d 332* (Mo. banc 1982), the court held that Article X, Section 22 applied to park and recreation fees levied by [**7] the county. Further, in *State ex rel. Askew v. Kopp, 330 S.W. 2d 882, 890 (Mo. 1960),* the court held that the distinction between governmental and proprietary functions of municipalities was developed by the courts to impose common law liability on municipal corporations for the negligence of their agents. Thus, the distinction between governmental and proprietary functions has little, if any, application outside of the tort liability of municipalities.

More importantly, Article X, Section 22 does not draw any distinction between governmental and proprietary activities. The prohibition of the section extends to levying any tax, license, or fee when none was in effect at the time the constitutional provision was adopted or to increasing such fees without a vote of the people. The constitutional provision is broad enough to cover all functions of a municipality and not just those of a proprietary nature. This is consistent with the purpose of the amendment contained in Article X, Section 22, which was to rein in increases in governmental revenue. *Roberts 636 S.W. 2d at 336*[9].

The City further contends that the appeal should be dismissed because the issues have become moot [**8] with the expiration of the agreement with the Foundation in September of 1987. It is agreed that the agreement did terminate in September of 1987, but the Lovings contend

that the case comes within the exception to the mootness doctrine, as stated in *State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Mo., 645 S.W. 2d 44, 51*[6] (Mo. App. 1982). That case held that [*52] the exception applies "to an issue of a recurring nature, of general public interest and importance, and which will evade appellate review unless the court exercises its discretionary jurisdiction." This case fits within the exception. If so motivated, the City could enter into any number of similar agreements, and by the time the issue of validity of one agreement reached this court, that agreement would have expired. This is a question of a recurring nature and is of public interest and importance. For that reason, this court will exercise its discretionary jurisdiction to decide the issues presented.

The City further contends that the petition did not state a cause of action for the recovery of fees paid. The petition does not plead in explicit terms that Loving paid a fee to [**9] use the tennis courts at the complex, although that would be a fair inference from the facts pled. However, as held in *Manufacturer's Casualty Ins. Co. v. Kansas City, 330 S.W. 2d 263, 265*[1] (Mo. App. 1959), the recovery of a license fee or tax based on an invalid statute or ordinance cannot be had if the payment was made voluntarily. This court further held that if the payment is deemed to be involuntary the payment of the tax may be recovered. Id. at [2, 3]. Here, there was no allegation that the tax was paid involuntarily, nor were there any facts pled to show that the payment was involuntary. For that reason, the petition does not state a cause of action for the recovery of the fees paid. However, on remand the court should allow an amendment to the petition if the Lovings desire to allege facts showing that the payment of fees was involuntary.

The judgment dismissing the cause of action is reversed, and this cause is remanded for further proceedings.

All concur.

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330 S.W.2d 882 printed in FULL format.

State of Missouri at the relation of Mrs. Marion E. Askew, Mrs. F. E. Badger and Henry N. Ess, and Norman C. Stephenson, Plaintiffs-Appellants, vs. John J. Kopp, Hunter Phillips and Floyd L. Snyder, Sr., as members of and constituting the Board of Zoning Adjustment of Jackson County, Missouri, Defendants-Respondents, and City of Raytown, a fourth class city, Intervenor-Respondent, William L. Sublette and Cora A. Sublette, Intervenors-Appellants

No. 47463

Supreme Court of Missouri Division 1

330 S.W.2d 882; 1960 Mo. LEXIS 868

01/11/60

PRIOR HISTORY: [**1]

From the Circuit Court of Jackson County

Civil Appeal From Review of Administrative Proceeding-Board of Adjustment of City of Raytown

Judge Richard C. Jensen

Reversed and remanded

CORE TERMS: lagoon, plant, zoning, sewage, sewage disposal, flood, site, water, l.c, regulations, engineer, municipal, condemn, sewer, mile, authorization, acquire, unincorporated, proprietary, village, zoned, embankments, dikes, feet, power of eminent domain, governmental function, zoning ordinance, police power, carriage, outfall

OPINIONBY: Houser, C.

OPINION: [*883] This is an appeal from a judgment of the Circuit Court of Jackson County in a proceeding in certiorari to review the action and decision of the board of adjustment of that county approving the application of the City of Raytown for authorization to use certain land in the unincorporated area of the county for a sewage disposal plant. Appellants Askew, et al. are protesting adjoining landowners. Appellants Sublette, protesting landowners whose lands lie upstream from the proposed sewer lagoon site, were permitted to intervene by order of the circuit court. Respondents are the City of Raytown and the members of the board of adjustment.

[*884] The City of Raytown is a city of the fourth class located in Jackson County. Its board of aldermen decided to build a sewage treatment plant consisting of two large sewage lagoons or oxidation basins, some 2-1/2 miles from the city limits, on three tracts totalling approximately 300 acres located one-half mile east [**2] of Noland Road, southeast of Conway Road, in a district (D) zoned as an agricultural district under the Zoning Order of Jackson County. The city entered into option contracts to buy the land needed. On March 13, 1958 the City of Raytown filed with the board of adjustment an application for authorization to use approximately 173 acres of land for a sewage disposal plant. An amended application, which embraced the larger 300-acre tract, was filed with the board of adjustment on March 25, 1958. On April 3, 1958 the Jackson County Planning Commission conducted a public hearing and recommended to the board of adjustment that the authorization be granted. On April 9, 1958 the board of adjustment conducted a public hearing which resulted in the entry of an order granting the authorization requested. Acting under § 64.120(3) Mrs. Marion E. Askew, et al. filed this petition for a writ of certiorari to review the data and records acted upon. The circuit court appointed a referee to take additional evidence. On final hearing the circuit court affirmed the order of the board of adjustment. This appeal followed.

The Zoning Order of Jackson County as amended by Amendment No. 42, adopted [**3] on October 17, 1955, distributed sewage disposal plants in Districts A to H, inclusive, including District D, "When authorized by order of the Board of Zoning Adjustment, after public hearing, provided that in their judgment such use will not seriously injure the appropriate use of neighboring property, and will conform to the general intent and purpose of this Order, and further subject to such regulations and conditions as may be imposed by said Board," and the following requirements:

"(1) A plan showing the area in which the sewer system is to be constructed, the size of the laterals, the size and location of the disposal plant, type of disposal plant

and the natural water shed of the area shall be filed with the County Planning Commission.

(2) Such plan shall be approved by the Missouri State Board of Health and the County Sewer Engineer prior to the filing of same with the County Planning Commission.

(3) Such plan shall be examined by the County Planning Commission and the approval or disapproval of such plan shall be made by the County Planning Commission to the Board of Zoning Adjustment for final approval or disapproval."

The city's evidence: At the time of the [**4] hearing Raytown was a city of 14,000-15,000 population. A population increase to 18,000 was expected by the time the sewage lagoons were to be completed. Sufficient land was to be acquired to take care of the sewage needs of a population of 42,000. Raytown, the largest city in the state without sewers, had one conventional, mechanical-type sewage disposal plant serving a part of the city but no city-wide, modern sewage system. Most of the city was served by septic tanks. There was a dangerous, unsanitary condition existing in various parts of the city. Eighty per cent of the city sewage was out on top of the ground. The city was confronted with potential epidemics. The city's consulting engineer testified that the area selected by the city for the sewage lagoon was the only site at which the needed area of low-lying ground could be found. Two sewage lagoons, surrounded by embankments or dikes ranging in height from 4 to 13 feet, were proposed for the present. The city's engineer testified that the sewage lagoons as designed should not produce odors. The [*885] nearest residence is 1040 feet from the proposed lagoons. The nearest lagoon would be located approximately [**5] 300 feet from the farm of appellant Henry N. Ess. With the highest water the lagoon dam will be three feet above the water level. Raw sewage would never spill out of the lagoon. There is no way, based on the elevations, that the lagoon could cause more flood on plaintiffs' farms than had occurred in the past. The embankments or dikes would not constitute a "plug" or a flood hazard by backing up the overflow waters of the Little Blue River. The plans had been approved by the State Board of Health and the County Sewer Department. The engineering on the lagoon conformed to the standards of the United States Public Health Service. The city's engineer testified as to the manner in which the lagoons were expected to treat the sewage so as to render it harmless when the effluent is dumped into the Little Blue River. He conceded that he had taken no sewage tests to determine the questions of seepage and pollution of underground water tables or whether the embankments or dikes around the lagoons would stand up under the periodic onrush of flood waters in the valley.

Appellants Askew, et al. offered testimony to show the following: Sewage lagoons are incapable of neutralizing detergents [**6] and ground food wastes. They tend merely to collect instead of treat and dispose of domestic sewage because of overloading. To perform properly there must be a low load factor. The water in the lagoons must be kept at a proper level and there must be a constant, plentiful supply of sunlight and oxygen. In their operation they tend to leave smelly deposits on the embankments and in the vegetation. Flies and mosquitoes breed in these places and after a period of cloudy, cold weather or after the water in the lagoons has been frozen over in the winter offensive odors arise, odors which are noticeable to residents and damaging to property even at a considerable distance depending upon the direction in which the wind is blowing. Appellants' engineer testified that a soil sample from the site of the proposed sewage lagoons disclosed an alluvial type soil composed of decayed organic matter not impervious to seepage or water erosion; that it would not offer much resistance to overflow waters; and that the proposed lagoons would constitute a plug or obstruction to the free flow of heavy rainfall and a substantial flood hazard in the Little Blue valley. There was evidence that the value [**7] of nearby lands would be depreciated. The F.H.A. places restrictions on housing loans in the near vicinity of such lagoons. Appellants' real estate expert testified that the Henry N. Ess farm on the east bank of the Little Blue River immediately across from the sewage lagoons would be damaged from $19,000 to $22,000 and that land would be rendered unsuitable for sub-division large lots for attractive suburban housing, the use and purpose for which it was best adapted, by reason of its location within three miles of the city limits of Independence in an area served by several main highways, its topography and wooded character, and the fact that it is now served by water, gas and electrical power lines.

After the writ of certiorari had been issued and the board of zoning adjustment had certified the record below to the circuit court for review a flash flood or cloudburst occurred in the Little Blue valley. High flood waters covered some of the main roads, rendered them impassable, surrounded and entered homes and buildings in the near vicinity of the lagoon site and flooded part of the proposed site and some of the low acreage of the appellants. On application the court [**8] appointed a referee to take additional evidence on the question of damage and depreciation of the value of the adjacent property and on the question of the flood hazard. Testimony and exhibits were produced relating to the flooding of the

proposed lagoon site and nearby areas in 1927-28, 1951 and in 1958. Appellants' engineer testified that following the high water in 1958 they had found flood debris [*886] high up in the limbs of the trees on both banks of the Little Blue River, higher than the lagoon site on the westerly bank. Photographs were introduced in evidence showing the level reached by the muddy water on cornstalks growing on the high northerly bank of the river which was higher than the lagoon site. The engineer testified that the dikes and embankments of the lagoons would constitute an obstacle which would constrict the flood plain of the river and would periodically tend to back up water so as to cause floods in the valley. Considerable evidence was introduced relating to inundation of the proposed plant site and surrounding territory in previous floods which occurred in 1927 and 1951.

The city produced an engineer who testified that the proposed lagoon installation [**9] would not increase the flood hazards, even if a flood twice as severe as the 1951 flood should occur. The city's engineer offered in evidence a revised plan for the locations of the lagoons whereby they were to be set back two or three hundred feet from the westerly bank of the river, thus allowing a wider channel than shown on an earlier map, and testified that even if the stream should flood in the lagoon site the lagoons and dikes would not raise the stream level more than a fraction of a foot at the mouth of Wilson Creek, a tributary. Evidence was presented showing that the lagoon would increase the value of the land surrounding the lagoon because of the availability of sewage facilities.

On this appeal appellants Askew, et al. make these points: The board of adjustment lacked jurisdiction to make the order because the zoning Enabling Act, § 64,100, et seq., contains no authority to grant "special use permits or authorizations for privileged use of certain lands in a zoned district." Amendment No. 42 is null and void because it does not provide uniform use regulations, guides or definite standards applicable to all properties alike, in violation of §§ 2 and 10, Art. I, Constitution [**10] of Missouri. It is invalid as an attempt to provide for "spot zoning" and an unlawful delegation of the county court's legislative and administrative powers, and of the state's police power, in violation of § 7, Art. VI, Constitution of Missouri. The board's order constitutes local, special or class legislation in violation of Clauses 28 and 30, § 40, Art. III, Constitution of Missouri. No proper notice of the hearing before the board of adjustment was given. Appellants Askew, et al. were denied equal protection of law and due process of law, in violation of § 2, Art. I of the Constitution of Missouri and § 1 of the 14th Amendment to the Constitution of the United States. The special permit granted to the city takes the private property of these appellants for a public use without paying just compensation therefor in violation of § 26, Art. I of the Constitution of Missouri. The order of the board is not supported by competent and substantial evidence upon the entire record. The competent and substantial evidence on the entire record "overwhelmingly establishes, beyond any question, that appellants' projects should have been upheld and respondent city's application for [**11] a special use permit should have been denied." Appellants Sublette raise the point that there was a failure to give the required notice to adjoining property owners and to meet other procedural requirements, thereby violating the requirements of due process of law and rendering the "special use permit" void; that the board of adjustment had no jurisdiction to grant such "special permit."

Questions involving a construction of the federal and state constitutions were raised by appellants Askew, et al. at the earliest opportunity, before the county planning commission, and were kept alive at every stage of the proceedings before the board of adjustment, in the circuit court, and in this court. We have appellate jurisdiction. *State ex rel. Christopher v. Matthews, 362 Mo. 242, 240 S.W.2d 934.*

Preliminary to a consideration of the points raised by appellants we are confronted with respondents' contention that [*887] the City of Raytown is not subject to the zoning regulations of Jackson County; that the city is immune from local zoning regulations because the city was engaging in a governmental function in providing for a sewage disposal plant; that the city has power to purchase [**12] or condemn lands within five miles of the city for sewer carriage and outfall and that the city's power of eminent domain, complete in itself, is not limited by the county's zoning power.

Appellants complain of the "strange and inconsistent" position taken by the City of Raytown in filing and pressing its application for authority under the zoning order to install and operate its sewage disposal plant and now, on appeal, "belatedly taking the position that it can do as it pleases, without regard for the 1st Class County Zoning Law." The city's contention, however, raises a question of the jurisdiction of the board of adjustment over the subject matter, which can be raised at any stage of the proceeding and for the first time on appeal. *Peerless Fixture Co. v. Keitel, 355 Mo. 144, 195 S.W.2d 449.*

The preliminary question - whether a local regulation made under the police power granted the county court in the field of zoning applies to the activities of a city outside its corporate limits under the police power granted

the board of aldermen to secure the general health of the city - will be answered by ascertaining the legislative intent and design in granting to cities the power [**13] to acquire sewage disposal plants, *Aviation Services v. Board of Adjustment, 20 N.J. 275, 119 A.2d 761,* l.c. 765, and is not to be resolved simply by applying the "governmental vs. proprietary" test.

The constitutional and statutory sources of the powers exercised by the two governmental units are as follows:

Article IV, § 37 of the Constitution of Missouri provides: "The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

Section 79.380 n1 provides that the board of aldermen of cities of the fourth class "may purchase or condemn and hold for the city, within or without the city limits, within five miles therefrom all necessary lands for * * * sewer carriage and outfall, * * * and make regulations to secure the general health of the city, * * *."

n1 All section references are to RSMo 1949, V.A.M.S., unless otherwise indicated.

Section 71.680 authorizes cities of the fourth class, among others, "for the protection and preservation of the [**14] public health," to acquire purification plants or sewage disposal plants, within or without the corporate limits of such cities, for the purification of all sewage accumulating in such cities, by purchase, construction, lease, gift or otherwise.

No applicable provision of the Constitution relating to zoning is to be found. n2

n2 Art. VI, § 18(c), Constitution of Missouri, 1945, relating to special charters for certain counties, authorizes the inclusion in such charters of provisions "for the vesting and exercise of legislative power pertaining to public health, * * * planning and zoning, in the part of the county outside incorporated cities; * * *" but Jackson County does not operate under a special charter.

Section 64.090(1) provides that "For the purpose of promoting health, safety, morals, comfort or the general welfare of the unincorporated portion of counties, to conserve and protect property and building values, to secure the most economical use of the land and to facilitate the adequate provision of public improvements all in accordance with a comprehensive plan, the county court in all counties of the first class, as provided by [*888] law, is hereby empowered [**15] to regulate and restrict, by order, in the unincorporated portions of the county, the height, number of stories, and size of buildings, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes, including areas of agriculture, forestry and recreation."

A review of these provisions in the light of the decided cases leads to the conclusion that the City of Raytown is not subject to the Zoning Order of Jackson County. Local zoning ordinances are not applicable to public uses of property for which an agency of the government has the power to acquire lands by the exercise of the power of eminent domain. In *State ex rel. St. Louis Union Trust Co. v. Ferriss, Mo. Sup., 304 S.W.2d 896,* the question was whether a city zoning ordinance could prohibit a land use sought to be appropriated by a school district. This Court held that the municipal zoning power granted by § 89.020 (which is couched in essentially the same language as that set forth in the quotation from § 64.090, supra) must be subordinated to the general power [**16] granted school districts to locate sites for school houses and to secure title thereto by agreement or condemnation; that under the rule of ejusdem generis the authority to regulate and restrict the location and use of buildings and lands for "trade, industry, residence or other purposes" relates to private property and the phrase "other purposes" is not to be broadened to include a public use of property by the state in carrying out its constitutional mandate to establish and maintain free public schools; that the power of eminent domain is superior to property rights, the right to exercise the power being exclusively a legislative prerogative, "subject only to such limitations as are fixed by the constitution itself." 304 S.W.2d, l.c. 898. The same construction was given the words "or other purposes" in *Congregation Temple Israel v. City of Creve Coeur, Mo. Sup., 320 S.W.2d 451,* in which this court held that the power given a municipality under § 89.020 to regulate and restrict "the location and use of buildings, structures and land for trade, industry, residence or other purposes" should not be broadened to include the right to restrict or regulate the location or use of property [**17] for religious purposes by religious organizations whose rights to the free exercise of religion are protected by constitutional guaranties. Giving the identical language of § 64.090 the same construction we rule that the power therein given the county court to regulate and restrict the location and use of buildings, structures, and land for trade, industry, residence or other purposes does not include authority to regulate and restrict the government or its political subdivisions in the use of buildings, structures and land for public purposes, exercised under a constitu-

tional mandate making the health of the people a matter of primary public concern and vesting in the general assembly authorization to grant power with respect thereto to cities (a power exercised by the passage of §§ 79.380 and 71.680); and that the words "trade, industry, residence or other purposes" contained in § 64.090, which are words of general inclusion, relate to private property uses and should not be construed to include the state or its political subdivisions, in such a manner as to encroach upon its sovereign power of eminent domain. The state and its agencies are not within the purview of a statute [**18] unless an intention to include them is clearly manifest, especially where prerogatives, rights, titles or interests of the state would be divested or diminished. *Hayes v. City of Kansas City, 362 Mo. 368, 241 S.W.2d 888.* The power granted to the county court under the zoning enabling act with respect to the unincorporated areas of the county must yield to the power granted cities of the fourth class to purchase or condemn all necessary lands within five miles of such city for sewer [*889] carriage and outfall and for the construction of sewage disposal plants. The right to condemn is superior to property rights, and is limited only by the constitution. McQuillan on Municipal Corporations, 3rd Ed., Rev., Vol. 8, § 25.15 says: "Zoning restrictions cannot apply to the state or any of its agencies vested with the right of eminent domain in the use of land for public purposes." The granting to the city of the right to condemn for sewer carriage and outfall, § 79.380, and to acquire sewage disposal plants, § 71.680, either within or without the corporate limits and within five miles thereof, in unconditional language, without any requirement in either section that the city respect [**19] or comply with local zoning regulations, together with the fact that the zoning law, § 64.090, does not empower the county court to regulate, or restrict the location of city-owned sewage disposal plants in the unincorporated areas of the county, see *Decatur Park Dist. v. Becker, 368 Ill. 442, 14 N.E.2d 490,* l.c. 493, indicate a legislative intent that the city's right to locate, acquire and establish a sewage disposal plant not be subject to the zoning orders of the county court. *Aviation Services v. Board of Adjustment, (1956) 20 N.J. 318, 119 A.2d 761,* l.c. 766. This question is considered in Anno. Applicability of zoning regulations to governmental projects or activities, *61 A.L.R.2d 970,* loc. cits. 978, 979.

The rule that the grant of the power of eminent domain to a public body desiring to utilize land for a purpose prohibited by a local zoning ordinance renders the zoning ordinance inapplicable has been applied frequently in other jurisdictions. Thus it has been held that a city could erect a fire station in an area of the city zoned for residences, apartments and churches, *Mayor of Savannah v. Collins, (1954) 211 Ga. 191, 84 S.E.2d 454;* a housing authority could condemn [**20] for a multiple-residence housing project in an area zoned for single-family residential use (notwithstanding the statute expressly made the housing authority amenable to local zoning laws), *West v. Housing Authority of Atlanta, (1954) 211 Ga. 133, 84 S.E.2d 30;* a county could build an airport in an area of a village in spite of a village zoning ordinance prohibiting the use of the property for an airport, *State ex rel. Helsel v. Board of County Commissioners, (1948) 149 Ohio St. 583, 37 Ohio Ops. 296, 79 N.E.2d 911;* a turnpike commission could establish a turnpike through territory zoned against turnpike use, *State ex rel. Ohio Turnpike Commission v. Allen, (1952) 158 Ohio St. 168, 48 Ohio Ops. 115, 107 N.E.2d 345,* cert. den. *Balduff v. Turnpike Commission, 344 U.S. 865, 97 L. Ed. 671, 73 S. Ct. 107;* and cities could establish airports without regard to township zoning regulations prohibiting the same. *Aviation Services v. Board of Adjustment, (1956) 20 N.J. 275, 119 A.2d 761; Petition of City of Detroit, (1944) 308 Mich. 480, 14 N.W.2d 140.*

The fact that the city's rights in the lands in question were not actually acquired by the exercise of the right of eminent domain, but by [**21] private negotiation and agreement with the owners, does not militate against our holding. The important consideration is that the city had the right to condemn private property for the use in question and not whether the city in the particular case actually resorted to condemnation. *Mayor of Savannah v. Collins, supra.*

Appellants strongly urge that in constructing and operating a sewage disposal plant the city will be using this public property for a proprietary and not a governmental function and that the property therefore is subject to zoning laws. In support of this contention appellants cite a number of cases involving the tort liability of a city for personal injuries or property damages sustained as a result of negligence on the part of a city in the construction, operation or maintenance of a sewer. *Cook v. Kansas City, 358 Mo. 296, 214 S.W.2d 430; Donahew v. City of Kansas City, 136 Mo. 657, 38 S.W. 571;* [*890] *Lucas v. City of Louisiana, Mo. App., 173 S.W.2d 629; Hannan v. Kansas City, 187 Mo.App. 315, 173 S.W. 703.* In these cases these functions are classified as proprietary in nature. *Jamison v. Kansas City, 223 Mo.App. 684, 17 S.W.2d 621* might be added [**22] to this list. And see Anno: Municipal operation of sewage disposal plant as governmental or proprietary function, for purposes of tort liability. *57 A.L.R.2d 1336.* The distinction between the governmental and proprietary functions of municipalities was drawn by the courts in order to impose common law li-

ability on municipal corporations for the negligence of their agents, servants or officers in the execution of corporate powers and duties. *City of Springfield v. Clouse, Mo. Sup., 206 S.W.2d 539,* l.c. 546; Dillon, Municipal Corporations, 5th Ed., Vol. 1, § 109. A limitation upon the old rule of governmental immunity from liability for personal injuries inflicted by governmental agencies became necessary as a matter of sound public policy. The reasons of policy which accounted for the development of this distinction have little validity or application in resolving the present conflict of jurisdiction in the exercise of the police power by two public bodies. Such a conflict is to be resolved, and the powers of the one are to be subordinated to the powers of the other, depending upon which of the two has been granted superior powers, and not by applying a distinction n3 useful [**23] and most usually invoked in determining questions of tort liability. Recently the Supreme Court of New Jersey had before it the question whether a village which proposed to build a water storage tank upon land it had acquired in an adjoining village, would violate the latter's zoning ordinance. That court said: "We cannot agree that the distinction between governmental and proprietary functions is relevant to this controversy. The distinction is illusory; whatever local government is authorized to do constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur. The distinction has proved useful to restrain the ancient concept of municipal tort immunity, not because of any logic in the distinction, but rather because sound policy dictated that governmental immunity should not envelop the many activities which government today pursues to meet the needs of the citizens. *Cloyes v. Delaware Twp., 23 N.J. 324, 129 A.2d 1, 57 A.L.R.2d 1327 (1957).* We see no connection between that classification and the problem before us." *Township of Washington v. Village of Ridgewood, (1958) 26 N.J. 578, 141 [**24] A.2d 308,* l.c. 311.

n3 This Court recently said: "Providing for drainage and sewerage is a governmental function and an exercise of the police power of the state." *State v. Metropolitan St. Louis Sewer District, 365 Mo. 1, 275 S.W.2d 225,* l.c. 230; *City of Springfield v. Clouse, supra, 206* S.W.2d, l.c. 546. And in *State ex rel. St. Louis Union Trust Co., supra,* this Court referred to the selection, location and procurement of a site for a public school (along with its operation) as a governmental and not a proprietary function. 304 S.W.2d, l.c. 902. So if it were relevant, the decision to establish a sewage disposal plant, and the selection, location and procurement of the site therefor (as contrasted with the actual construction or operation of the plant), might well be regarded as a governmental function.

We conclude that in locating the sewage disposal plant the city was not subject to the county zoning order. The city was authorized to acquire the site in question for the intended purpose without regard to the zoning order and without making application to the county authorities for authorization to use the land for the intended purpose. Neither the county planning [**25] commission nor the board of adjustment had jurisdiction of the subject matter. Neither had power to rule upon the city's application. All of the proceedings before both bodies were coram non judice and void. Under the procedure for [*891] review of the agency's decision provided for by § 64.120(3) the circuit court could not in the first instance, nor can this court on appeal, do anything but reverse, affirm or modify the decision of the agency. Where, as here, the agency is wholly without jurisdiction, the authority of the circuit court under § 64.120(3) is limited to the reversal of the order in question and the remand of the cause to the administrative agency with directions to dismiss the proceedings. In the original certiorari proceedings the circuit court could not nor can this court on appeal consider the application on the merits or administer equitable or other relief. Whether the complaining parties have some other remedy, such as a suit in equity based upon the theory that the board of aldermen, in exercising its discretion, acted arbitrarily, fraudulently, capriciously or oppressively, see *McMurry v. Kansas City, 283 Mo. 479, 223 S.W. 615;* 64 C.J.S. Municipal [**26] Corporations § 1803; or some other equitable proceeding; or an action based upon the theory of nuisance, see Anno: Sewage disposal plant as nuisance, *40 A.L.R.2d 1177;* or any of the remedies suggested in *Beetschen v. Shell Pipe Line Corp., Mo. App., 248 S.W.2d 66,* l.c. 70, or otherwise, are questions not before us on this appeal.

Accordingly, the judgment of the Circuit Court of Jackson County is reversed and the cause is remanded with directions to reverse the order of the board of adjustment and remand the cause to the board of adjustment with directions to dismiss the proceedings.

Coil, C., Concurs.

Holman, C Concurs.

PER CUR 1: The foregoing ion by Houser, C., is adopted a opinion of the c rt.

All of the Judges concur.

ANDREWS OFFICE PRODUCTS UPPER MARLBORO, MD (*)

206 S.W.2d 539 printed in FULL format.

City Of Springfield, Missouri, a Municipal Corporation, Appellant, v. Harry Clouse, Robert Laxton, Otto Bowles, R. F. Walters, O. F. Bruhn, C. O. Scroggins, T. J. Musgrave, Fred Guinn, James K. Gilmore, Gene Parsons, J. Frank Cline, Lester Wimmer, Ralph Holly, E. J. Barrett, M. E. Taber, and Richard Groom

No. 40127

Supreme Court of Missouri

356 Mo. 1239; 206 S.W.2d 539; 1947 Mo. LEXIS 680

November 10, 1947

PRIOR HISTORY: [***1]
Appeal from Greene Circuit Court; Hon. Warren L. White, Judge.

DISPOSITION: Reversed and remanded (with directions).

CORE TERMS: collective bargaining, bargaining, municipal, wage, public officers, public employees, civil service, municipality, organize, constitutional law, private industry, public service, tenure, l.c, constitutional convention, legislative branch, eligible list, public office, second class, classification, convention, promotion, decree, municipal employees, usually understood, binding, proprietary capacity, form of government, public employment, public welfare

HEADNOTES:
CONSTITUTIONAL LAW: Master and Servant: Municipal Corporations: Collective Bargaining Contracts: Constitutional Provision Not Applicable: Violation of Statutes. Sec. 29, Art. I, 1945 Constitution does not apply to municipal employees. And collective bargaining contracts violate statutory provisions dealing with municipalities.

CONSTITUTIONAL LAW: Master and Servant: Municipal Corporations: Right of Public Employees to Organize. Public employees have constitutional rights to organize subject to regulation for the public welfare.

CONSTITUTIONAL LAW: Master and Servant: Municipal Corporations: Collective Bargaining Not Applicable to Municipal Employees. The process of collective bargaining, as usually understood, cannot be transplanted into the public service. Public employees have the rights of petition, peaceful assembly and free speech and may be represented by union officers in exercising these rights.

CONSTITUTIONAL LAW: Master and Servant: Municipal Corporations: Sec. 29, Art. I, 1945 Constitution Limited to Private [***2] Employees. Sec. 29, Art. I, 1945 Constitution was intended to safeguard collective bargaining as that term was usually understood in employer and employee relations in private industry. The purpose of collective bargaining is to reach binding agreements between unions and their employer and can have no application to public employees. The debates of the convention on this section are not conclusive and the section should not be given a construction altering fundamental principles of government clearly set forth in other portions of the constitution which establish a system of government by laws instead of men. And the same principles apply to municipalities which exercise part of the legislative power of the state.

CONSTITUTIONAL LAW: Master and Servant: Municipal Corporations: Public Employment Not Contractual. Under our form of government public office or employment cannot become a matter of bargaining and contract. Legislative powers are involved and they may not be delegated, bargained or contracted away by executive officers.

CONSTITUTIONAL LAW: Master and Servant: Municipal Corporations: Corporate or Proprietary Employees: Collective Bargaining Not [***3] Applicable. No distinction should be made as to employees of the city in connection with its corporate or proprietary capacity. They are performing public functions and the civil service laws and other statutes are equally applicable, so there are no rights of collective bargaining for such employees.

COUNSEL: Theodore Beezley and A. P. Stone, Jr., for

appellant.

(1) It is well-settled rule of statutory construction that unless an act specifically mentions the city, said act shall not be construed so as to include it. 25 R.C.L., sec. 32, p. 784; 49 Am. Jur., secs. 14, 15, pp. 235, 236; 59 C.J. 653, p. 1103; City of Clinton ex rel. Thornton v. Henry County, 115 Mo. 557, 22 S.W. 494; Petrucci v. Hogan, 27 N.Y.S. (2d) 718; Nutter v. Santa Monica, 168 Pac. (2d) 741; Balthasar v. Pacific Elec. Ry. Co., 187 Cal. 302, 202 Pac. 37, 19 A.L.R. 452; United States of America v. United Mine Workers of America, an unincorporated association; United States of America v. John L. Lewis, individually and as President of the United Mine Workers of America; United Mine Workers of America, an unincorporated association, v. United States of America; and John L. Lewis, individually and as President [***4] of the United Mine Workers of America v. United States of America; United Mine Workers of America, an unincorporated association, and John L. Lewis, individually and as President of the United Mine Workers of America, v. United States of America, 91 Law Ed., Advance Opinion, p. 595; Miami Water Works Local No. 654 v. Miami, 26 So. (2d) 194, 167 A.L.R. 967; State ex rel. Buchanan County v. Imel, 242 Mo. 293, 146 S.W. 783. (2) The intention of the Constitutional Convention, by its Debates, was that Section 29 of Article I of the Missouri Constitution, 1945, would not apply to the state and municipal employees or affect the then existing relationship of municipal employees and employer. Debates of the Constitutional Convention, pp. 1934, 1935, 1936, 1941, 1961, 1963. (3) Repeal by implication is not favored. Hull v. Baughman, 131 S.W. (2d) 721; State ex rel. St. Louis Police Relief Assn. v. Igoe, 107 S.W. (2d) 929. (4) Section 29 of Article I of the Constitution of Missouri does not apply to municipal officers. Secs. 6673, 6674, R.S. 1939; Kirby v. Nolte, 349 Mo. 1015, 164 S.W. (2d) 1; State ex rel. Pickett v. Truman, 333 Mo. 1018, 64 S.W. (2d) 105; Gracey v. St. Louis, 213 Mo. [***5] 384, 111 S.W. 1159; People ex rel. Van Valkenburg v. Myers, 11 N.Y.S. 217. (5) The term "collective bargaining" as generally understood does not apply to municipal employees. Labor Unions and Municipal Employe Law, pp. 69-71; Nutter v. Santa Monica, 168 Pac. (2d) 741; City of Cleveland v. Division 268 of the Amalgamated Assn. of Streets, Electric Ry. & Motor Coach Employees of America, 15 Ohio Supp. 76; Miami Water Works Local No. 654 v. City of Maimi, 26 So. (2d) 194, 167 A.L.R. 967. (6) The oath taken by a city employee would conflict with the oath and obligations taken by an employee becoming a member of a labor union. Sec. 6673, R.S. 1939; Sec. 2, Art. I, Mo. Constitution; Fourteenth Amend. U.S. Constitution. (7) Under Section 6614, R.S. 1939, the council shall be vested with all powers of legislation in municipal affairs touching every object within the purview of the local self-government conferred upon every city of the second class. Any bargaining with the labor unions would be an unlawful delegation of legislative powers that is mandatorily vested in the council alone. Sec. 6614, R.S. 1939; City of Cleveland v. Division 268 of the Amalgamated Assn. of Streets, Electric [***6] Ry. & Motor Coach Employees of America, 30 Ohio Law Rep. 395, 15 Ohio Supp. 76; Mugford v. Mayor and City Council of Baltimore, 44 A. (2d) 745; Miami Water Works Local No. 654 v. Maimi, 26 So. (2d) 194, 167 A.L.R. 967. (8) Each of the four proposed agreements, and any collective bargaining agreement that might be entered into, would constitute an unconstitutional, unlawful and unauthorized delegation of public power and authority to labor unions who are private organizations and who are not responsible to the electorate and over which there is no public control. Mugford v. Mayor and City Council of Baltimore, 44 A. (2d) 745; Maimi Water Works Local No. 654 v. Maimi, 26 So. (2d) 194, 167 A.L.R. 967; McQuillin, Mun. Corps. (2d Ed. Rev.), secs. 393, 394, 395, 519, 1271; City of Cleveland v. Division 268 of the Amalgamated Assn. of Streets, Electric Ry. & Motor Coach Employees of America, 30 Ohio Law Rep. 395, 15 Ohio Supp. 76. (9) The council does not have discretionary power as to wages, hours, manner and method of hiring, method of discharging, promotions, demotions, vacations, sick-leave, or any type of working condition. Therefore, all these things being governed by statute or [***7] ordinance, there is nothing to bargain for as the term "collective bargaining" is generally understood. Sub-secs. 3, 4, Sec. 39, Art. III, Constitution of Missouri; Sec. 6609, sub-sec. XXV, R.S. 1939; Secs. 6613, 6614, 6615, 6617, 6652, 6659, 6669, 6671, 6672, 6678, 6679, 6680, 6681, 6682, 6683, 6684, 6685, 6686, 6687, 6688, 6842, R.S. 1939; General Ordinance No. 360, City of Springfield, passed May 26, 1945; General Ordinance No. 361, City of Springfield, passed May 26, 1945; General Ordinance No. 214, City of Springfield, passed April 21, 1942; Sec. 5, Chap. 1, Revised Ordinances of Springfield, 1936; Hagerman v. City of Dayton, 71 N.E. (2d) 246. (10) A city cannot enter into a contract unless the same be within the scope of its powers or be expressly authorized by law. Sec. 3349, R.S. 1939; Sub-secs. 3, 4, Sec. 39, Art. III, Constitution of Missouri, 1945, 133 Mo. App. 328, 112 S.W. 979, affirmed 240 Mo. 187, 144 S.W. 1198. (11) The powers of a city, including the power to make contracts, is defined and limited by law. Sec. 15, Art. VI, Constitution of Missouri, 1945. (12) The city has only the power and authority expressly granted

to it by the Legislature, under its charter, [***8] or any power that might be necessarily or fairly in or incident to the powers expressly granted, and any fair and reasonable doubt concerning the existence of power is resolved by the courts against the city and the power is denied. Dillon, Mun. Corp. (3d Ed.), sec. 89; State ex rel. City of Hannibal v. Smith, 335 Mo. 825, 74 S.W. (2d) 367; State ex rel. City of Blue Springs v. McWilliams, 335 Mo. 816, 74 S.W. (2d) 363; Sec. 3349, R.S. 1939; Sub-secs. 3, 4, Sec. 39, Art. III, Constitution of Missouri, 1945. (13) The trial court erred in finding and declaring in his opinion that the city could recognize the union as the bargaining agent for those employees who are members of the union. The legislative deliberations and functions of the city council would be influenced and controlled by the labor unions which would be an unlawful delegation of legislative power and authority. McQuillin, Mun. Corps. (Rev. Vol. 1), secs. 393, 395; Edwards v. Kirkwood, 147 Mo. App. 599, 127 S.W. 378; Fred Wolferman Bldg. Co. v. General Outdoor Advertising Co., 30 S.W. (2d) 157; City of St. Louis v. Polar Ice & Fuel Co., 317 Mo. 907, 296 S.W. 993; Bigelow v. Springfield, 178 Mo. App. 463, 162 S.W. 750; [***9] State v. Field, 17 Mo. 529. (14) The city council would be discriminating in favor of union employees and against non-union employees in violation of the civil service statutes, and would deny equal protection of the law in violation of the Constitution of Missouri, Section 2, Article I, and in violation of the Fourteenth Amendment to the Constitution of the United States. Missouri Constitution, Sec. 2, Art. I; Fourteenth Amend., U.S. Constitution; Secs. 6678-6688, R.S. 1939; Mugford v. Mayor and City Council of Baltimore, 44 A. (2d) 745. (15) "Collective bargaining" means a written contract and a contract with any labor union would be unilateral and unenforceable by the city in law or equity and therefore illegal, unauthorized and void. Clark v. Grand Lodge of Brotherhood of Railroad Trainmen, 328 Mo. 1084, 43 S.W. (2d) 404; Aalco Laundry Co. v. Laundry Linen, U.L. No. 336, 113 S.W. (2d) 1081, 115 S.W. (2d) 89; Forest City Mfg. Co. v. International L.G.W. Union, 111 S.W. (2d) 934; Graham v. Grand Division Order of Ry. Conductors, 107 S.W. (2d) 121; Cole County v. Central Mo. Trust Co., 302 Mo. 222, 257 S.W. 774. (16) The trial court erred in finding and declaring in his opinion [***10] that the city could legally deduct union dues from the wages of city union members and pay the dues so deducted to the union each month; and by further declaring that this would be an assignment of employees' wages, and that there was no city charter provision forbidding same. In this state, as in other states, the assignment by a city officer or employee is contrary to public policy and void, and the courts will not enforce such an agreement. Nelson v. Townsend, 132 Mo. App. 390, 111 S.W. 894; State v. Williamson, 118 Mo. 146, 23 S.W. 1054, 21 L.R.A. 827; Beal v. McVicker, 8 Mo. App. 203; State ex rel. K. C. Loan Guaranty Co. v. Kent, 98 Mo. App. 281, 71 S.W. 1066; Hagerman v. City of Dayton, 71 N.E. (2d) 246. (17) The city would be a collection agency at the taxpayers' expense and this would be illegal. Mervin v. Chicago, 45 Ill. 133. (18) The trial court erred in finding and declaring in his opinion that the city could bargain as to the number of days' labor required each week. The city council has the exclusive power to fix the number of days worked each week. Sec. 6615, R.S. 1939. (19) The city must have an express power to bargain before it can bargain collectively on [***11] any matter. Collective bargaining means a written agreement and the trial court erroneously started off with the wrong premise when he said Section 29, Article I of the Missouri Constitution applied to municipal employees. Sec. 3349, R.S. 1939; Sub-secs. 3, 4, Sec. 38, Art III, Constitution of Missouri, 1945. (20) This would be an unlawful, illegal, and unwarranted delegation of the city council's power to a private organization, namely: the labor union, when the council has the express vested statutory power and the duty reposed in it by the people of the city at the poles. Secs. 6613, 6614, 6615, 6651, R.S. 1939. (21) The trial court erred in finding and declaring in his opinion that a contract for one year's length of time appears to be reasonable. A contract binding the city for any length of time would be illegal, unauthorized and void, because it would be unilateral, thus unenforcible, and the city could not sue for performance thereon in law or equity. Clark v. Grand Lodge of Brotherhood of Railroad Trainmen, 328 Mo. 1084, 43 S.W. (2d) 404; Aalco Laundry Co. v. Laundry Linen, U.L. No. 336, 113 S.W. (2d) 1081, 115 S.W. (2d) 89; Forest City Mfg. Co. v. International L.G.W. [***12] Union, 111 S.W. (2d) 934; Graham v. Grand Division Order of Ry. Conductors, 107 S.W. (2d) 121; Cole County v. Central Mo. Trust Co., 302 Mo. 222, 257 S.W. 774. (22) A contract could not be drawn containing any covenant to be performed by the labor unions which would not violate the Constitution of Missouri, the statutes, and ordinances of the city. Secs. 6614, 6615, 6617, 6651, R.S. 1939. (23) The trial court erred in finding and declaring in his opinion that a contract might be drawn containing substantial covenants to be assumed and performed by each employee choosing to work thereunder, though it be negotiated by the union officials as their agents. The oath taken by an officer or employee under Section 6673, R.S. 1939, before entering upon his duties, is the only covenant that is assumed or performed by the officer or employee. Any other agreement or covenant taken or agreed to be performed by the employee would be repugnant to and in viola-

tion of this section. Sec. 6673, R.S. 1939. (24) A municipal employee's sole allegiance is to the city and the public, and membership in a labor union would lead to a divided allegiance. Such rights and objectives are inconsistent with [***13] union rights and objectives. City of Jackson v. McLeod, 24 So. (2d) 319; Mugford v. Mayor and City Council of Baltimore, 44 Atl. (2d) 745; Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N.W. (2d) 310; Carter v. Thompson, 164 Va. 312, 180 S.E. 410; Hutchinson v. Magee, 278 Pa. 119, 122 Atl. 234; McNatt v. Lawther, 223 S.W. 503; San Antonio Fire Fighters' Local Union No. 84 v. Bell, 223 S.W. 506; Brownell v. Russell, 76 Vt. 326, 57 Atl. 103; McAuliffe v. Mayor, of New Bedford, 155 Mass. 442, 29 N.W. 517.

Clif Langsdale, Clyde Taylor, and William Moon for respondents.

(1) The court erred in ruling that the City, in fixing wage, could not provide for payment of overtime. Secs. 6842, 6672, R.S. 1939; United States v. Smith, 5 L. Ed. 57; Mobile Railroad Co. v. Tenn., 153 U.S. 497, 14 S. Ct. 968; Lee v. Parson, 143 So. 516; Losecco v. Gregory, 32 So. 985; Singer v. Campbell, 217 Ky. 830, 200 S.W. 667; Coke on Littleton quoted in 43 Bouvier's Law Dictionary 158; Sec. 10166, R.S. 1939; Union Agreement Provisions, Bulletin 686, U.S. Department of Labor, p. 91; Selective Bargaining Contracts, Bureau of National Affairs, p. 397; 59 C.J. 1014; State v. Hackmann, 240 S.W. 135; [***14] State v. Eckhardt, 322 Mo. 49, 133 S.W. 321; Gum v. St. Louis Railroad Co., 198 S.W. 494; State v. Forest, 162 S.W. 706; Louisiana Purchase Exposition v. Schnurmacher, 132 S.W. 326; Lexington v. Commercial Bank, 108 S.W. 1095; State v. Hughes, 199 S.W. (2d) 408. (2) The court erred in ruling that since a Union was an unincorporated association any contract made with it would not be enforceable by any proceeding known to the law. 4 Am. Jur., p. 481; Heath v. Goslin, 80 Mo. 301; Stone v. Guth, 102 S.W. (2d) 738, 13 Mich. Law Review; 4 Am. Jur. 481; Murphy v. Holiday, 16 S.W. (2d) 107.

David M. Proctor and Forest Hanna for City of Kansas City, amicus curiae.

(1) A law given right to organize means a right for a large group through customary procedure to authorize a small group of members to speak for and act for the entire membership, and to bind that membership by commitments. And it should also be undebatable that the right to "bargain collectively" contemplates the right to propose, urge, conclude, and execute a contract, pertaining to any of the many phases of employment and binding upon both employer and employee. Shelly v. Portland Tug Co., 76 Pac. (2d) 477, 158 [***15] Ore. 377; Brisbin v. Oliver Lodge, 279 N.W. 277; Rentschler v. Mo. Pac. Ry. Co., 253 N.W. 694, 126 Neb. 493. (2) Unless an act specifically mentions the state and its political subdivisions, or its agencies, said act shall not be construed as to include them. 25 R.C.L., sec. 32, p. 784; Clinton v. Henry County, 115 Mo. 557, 22 S.W. 494; Nutter v. Santa Monica, 168 Pac. (2d) 741; Balthasar v. Pacific Electric Ry. Co., 187 Cal. 302, 202 Pac. 87, 19 A.L.R. 452.

JUDGES: Hyde, J.

OPINIONBY: HYDE

OPINION: [*1245] [**541] This is a declaratory judgment action seeking determination of the legal power of the City to make collective bargaining contracts, with labor unions representing city employees, concerning wages, hours, collection of union dues, and working conditions. Defendants are officers and representatives of the unions involved. The trial court declared that Section 29 of Article I of the 1945 Constitution applied to municipal employees but that the City had no lawful power to enter into any of the proposed contracts. All parties have appealed from the trial court's decree.

The trial court's decree declared "that the City has no lawful power to enter into any of said contracts [***16] as proposed, for the following reasons: 1. They all provide for a fixed basic wage for a stated length of time, which if agreed to by the City would be an abdication of its power to increase or diminish wages at any time, as provided by Sec. 6659. (All references to statutes are to R.S. 1939 and Mo. Stat. Ann. unless otherwise stated.) 2. They all provide for payment at an increased hourly rate for all time worked over a stated amount per day or per week, in violation of Section 6672 which provides that employees shall be paid a fixed salary or wage. 3. In all of the contracts proposed one of the contracting parties is a labor union, which is an unincorporated association, which cannot sue or be sued, and hence any contract made with such a union would not be enforceable by any proceeding known to the law. 4. The first two contracts provide for a closed shop, that is the employment only of union members, and the third contract, while not so drastic, gives a preference to union members in the selection of employees, all of which is in violation of the civil service laws, Sections 6678-6688. 5. The fourth contract contains no covenants of any kind on the part of the employees and [***17] no consideration moving to the City for the covenants it would assume."

The trial court's view (as stated in an opinion filed with the decree) was that "a contract might be drawn

containing substantial covenants to be assumed and performed by each employee working thereunder, so that it becomes a contract made directly between the City and the individual employees choosing to work under it, though it be negotiated by the union officials as their agents." Thus what the trial court thought proper was not collective bargaining, with a contract between the employees' union and their employer as in private industry, but collective negotiations for individual contracts only to be made separately between each employee and the City. [As to the nature of collective bargaining contracts see *J. [*1246] I. Case Co. v. National Labor Relations Board, 321 U.S. 332, 64 S. Ct. 576, 88 L. Ed. 763;* See also 31 Am. Jur. 872, Sec. 97.]

Defendants say: "there is but one fundamental and essential question involved in this case, which is whether Section 29, Article I, of the Constitution 'that employees shall have the right to organize and to bargain collectively through representatives of their [***18] own choosing,' is applicable to a municipality, and, if so, to what extent and under what limitations." The City contends that Section 29 applies only to employees of private employers. Defendants' [**542] position is that this provision does apply to employees of the City engaged in its corporate or proprietary capacity. They argue "that the same fundamental considerations that caused the constitutional convention to secure the right of collective bargaining to 'employees' of private employers, apply with equal force to city employees, at least those employed by the City in its corporate capacity." For the reasons hereinafter stated, we must rule that Section 29 does not apply to any public officers or employees. We must further hold that the statutes (Article 3, Chapter 38) providing the organization and powers of cities of the second class prevent the City from making any of the proposed contracts.

This ruling does not mean, as defendants' counsel seem to fear, that public employees have no right to organize. All citizens have the right, preserved by the first amendment to the United States Constitution and Sections 8 and 9 of Article I of the 1945 Missouri Constitution [***19] (Sections 14 and 29, Constitution of 1875), to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body. Employees had these rights before Section 29, Article I, 1945 Constitution was adopted. [See *Allen Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 237 Wis. 164, 295 N.W. 791,* affirmed *315 U.S. 740, 62 S. Ct. 820, 86 L. Ed. 1154; Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 60 S. Ct. 561, 84 L. Ed. 732.]* Organization by citizens is a method of the democratic way of life and most helpful to the proper functioning of our representative form of government. It should be safeguarded and encouraged as a means for citizens to discuss their problems together and to bring them to the attention of public officers and legislative bodies. Organizations are likewise helpful to bring public officers and employees together to survey their work and suggest improvements in the public service as well as in their own working conditions. Our General Assembly has even provided by statute for an organization [***20] of all trial and appellate judges of this state to consider and discuss the work of the courts and make recommendations for legislation. [See Judicial Conference Act of 1943, Laws 1943, p. 514; Mo. Stat. Ann. 2039.1-2039.8.] [*1247] Organizations of other state, county and municipal officers are well known and have long been recognized as serving a useful purpose. Nevertheless, the organization and activity in organizations of public officers and employees is subject to some regulation for the public welfare. [See *United Public Workers v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 509; Oklahoma v. United States Civil Service Commission, 330 U.S. 127, 67 S. Ct. 544, 91 L. Ed. 537; King v. Priest, No. 39954, 206 S.W. (2d) 547,* decided concurrently herewith and cases therein cited.] This is because a public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare or be required for the discipline of a military or police organization.

Therefore, we start with the proposition that there is nothing improper in the organization of municipal employees into labor unions; [***21] and that no new constitutional provisions were necessary to authorize them. However, collective bargaining by public employees is an entirely different matter. This was pointed out by such a friend of union labor as our late President, Franklin D. Roosevelt, in a letter to the head of a union of federal employees, which was read in the debates on Section 29 in our Constitutional Convention. This letter states: "All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employe organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employes alike are governed and [**543] guided, and in

many instances restricted, by laws which establish policies, procedures, or rules in personnel matters."

Indeed defendants' [***22] counsel recognize (as did the sponsors of Section 29 in the Constitutional Convention) that wages and hours must be fixed by statute or ordinance and cannot be the subject of bargaining. In the argument in this case, en banc, it was conceded that a city council cannot be bound by any such bargaining; that it must provide the terms of working conditions, tenure and compensation by ordinance; and that it likewise by ordinance may change any of them the next day after they have been established.

Honorable R. T. Wood, President of the State Federation of Labor, who proposed Section 29 in the Convention, said: "I don't believe there is anyone in the organization that would insist upon having a collective bargaining agreement with a municipality setting forth wages, hours, and working conditions. That would be absolutely impossible [*1248] insofar as wages and hours are concerned because the Common Council and the Mayor are the last word and you cannot pay a salary or wage to a municipal employee unless it is provided by law." It is true that Mr. Wood also contended that collective bargaining was applicable to other matters such as "classifications, working conditions of all kinds, [***23] night work, day work, and a multiplicity of items aside from wages and hours that the representatives of the organized groups meet and deal with the city officials of the head of any department under which the employees might be working." He further stated: "Now, collective bargaining means a good many things. There is many types of collective bargaining. When you sit down at a table, representative of the employees of the city sits down at a table and discusses the matter concerning employees relations between an employee and the city, that is collective bargaining."

This is confusing collective bargaining with the rights of petition, peaceable assembly and free speech. Certainly public employees have these rights for which Mr. Wood was contending; and can properly exercise them individually, collectively or through chosen representatives, subject, of course, to reasonable legislative regulation as to time, place and manner in the interest of efficient public service for the general welfare of all the people. However, persons are not engaging in collective bargaining when they tell their senator, representative or councilman what laws they believe they should make. Neither [***24] are they engaging in collective bargaining with executive or administrative officers when they urge them to exercise discretionary authority within standards and limits which they have received or must receive from the legislative branch, or ask them to make recommendations to the legislative branch for further legislation.

Undoubtedly Section 29 had a different purpose. It was intended to safeguard collective bargaining as that term was usually understood in employer and employee relations in private industry. It is in the exact language of the National Industrial Recovery Act of 1933 (48 Stat. 195, 198, Chap. 90, Sec. 7(a)(1)) the stated purpose of which was "promoting the organization of industry . . . to induce and maintain united action of labor and management." It is substantially the same as Section 7 of the National Labor Relations Act *(29 U.S.C.A. Sec. 157)* which was adopted for the purpose of compelling collective bargaining in private industry and which specifically excluded public employees. [*29 U.S.C.A. Sec. 152.]* Thus the principal purpose of Section 29 was to declare that such rights of collective bargaining were established in this state. It means that employees [***25] have the right to organize and function for a special purpose: namely, for the purpose of collective bargaining. Surely the real purpose of such bargaining is to reach agreements and to result in binding contracts between unions representing employees and their employer. But legislative discretion [*1249] cannot be lawfully bargained away and no citizen or group of citizens have any right to a contract for any legislation or to prevent legislation. The only field in which employees have ever had established collective bargaining rights, to fix the terms of their compensation, hours and working conditions, by such collective contracts, was in private industry.

[**544] As stated by the United States Supreme Court in the J.I. Case Co. case (64 S. Ct., l.c. 579,) collective bargaining is not for the purpose of making individual contracts of employment. On the contrary: "The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. Without pushing the analogy too far, the agreement may be likened to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities [***26] for insurance policies, or to utility schedules of rates and rules for service, which do not of themselves establish any relationships but which do govern the terms of the shipper or insurer or customer relationship whenever and with whomever it may be established. . . . The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates." As applied to public office or employment, this would mean government by private agreement and not by laws made by the representatives of the people.

Both parties hereto rely strongly on statements made in the debates in the convention. As hereinabove shown, these confused collective bargaining with rights guaranteed by other unchanged provisions of the Constitution and assumed that the right of employees to organize at all for any purpose might depend on this section. Defendants rely upon the defeat of an amendment providing "that this section shall not apply to the state, or any sub-division or municipality [***27] thereof." Much of the debate upon this amendment disclosed the fear that it would prevent public employees from being members of labor organizations to which many already belonged. It seems reasonable that it was defeated because it was considered too drastic in this respect rather than for the purpose of extending actual collective bargaining to public employment. Likewise, Mr. Wood's original proposal was opposed because it stated, as Section 1, that "there shall be no abridgment of the right of employees to organize and bargain collectively through representatives of their own choosing." It was argued that the words "no abridgment" were drastic enough to limit the police power of the state. Moreover, originally there was also a proposed Section 2, stating there should be no abridgment of the right of an officer or employee of the state or any political sub-division to belong to a labor organization, which likewise [*1250] was not adopted. Thus the Convention did not settle the matter of public employees in labor organizations and their functions in governmental relations but left the matter to the legislature and the courts. While these debates are instructive [***28] as to the background and development of this proposal, nevertheless what was submitted to the people for adoption was Section 29 and not any delegate's speech about it. [See *Adamson v. California, 67 S. Ct. 1672, 91 L. Ed. 1464,* and concurring opinion of Justice Frankfurter, 67 S. Ct., l.c. 1682; see also *Household Finance Corp. v. Shaffner, 356 Mo. 808, 203 S.W. (2d) 734,* l.c. 737.] Furthermore, the people voted on the adoption of an entire Constitution so that Section 29 must be construed in connection with all the provisions of the Constitution of which it is a part, many of which have long been essential parts of our basic law.

So considered it seems unreasonable to construe Section 29 as altering fundamental principles of government so clearly and positively set forth in our Constitution by applying it to bargaining for public office or employment. The principle of separation of powers is stated in Article II (Art. III, 1875 Const.) which provides that "the powers of government shall be divided into three district departments . . . each of which shall be confided to a separate magistracy"; and that "no person, or collection of persons, charged with the exercise of powers [***29] properly belonging to one of those departments, shall exercise any power properly belonging to either of the others." This establishes a government of laws instead of a government of men; a government in which laws authorized to be made by the legislative branch are [**545] equally binding upon all citizens including public officers and employees. The legislative power of the state is vested in the General Assembly by Section 1 of Article III. (Sec. 1, Art. IV, 1875 Const.) The members of the legislative branch represent all the people, and speak with the voice of all of the people, including those who are public officers and employees. In the exercise of their legislative powers, they must speak through laws which must be equally binding upon all and not through contracts. Even the making of public contracts must be authorized by law. (See Sec. 39(4), Article III, 1945 Const., Sec. 48, Art. IV, 1875 Const.) Laws must be made by deliberation of the lawmakers and not by bargaining with anyone outside the lawmaking body. These same governmental principles and constitutional provisions apply also to municipalities because their legislative bodies exercise part of the legislative [***30] power of the state. [See *City of Springfield v. Smith, 322 Mo. 1129, 19 S.W. (2d) 1; Ex parte Lerner, 281 Mo. 18, 218 S.W. 331* and cases cited; see also Sections 6613-6617 as to legislative powers of the city council of second class cities.] The City's organization and powers come from the General Assembly which is authorized by Section 15, Article VI (Sec. 7, Art. IX, 1875 [*1251] Const.) to provide for the organization and classification of cities and towns with the limitation that "the number of such classes shall not exceed four; the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions." It is inconceivable that the Constitutional Convention intended to invalidate all of the statutes, enacted through the years under this authority, concerning the operation of municipalities in fixing and regulating compensation, tenure, working conditions and other matters concerning public officers and employees.

Under our form of government, public office or employment never has been and cannot become a matter of bargaining and contract. [*State ex rel. Rothrum [***31] v. Darby, 345 Mo. 1002, 137 S.W. (2d) 532;* see also *Nutter v. City of Santa Monica (Cal.), 168 Pac. (2d) 741,* l.c. 745; *Miami Water Works Local v. City of Miami (Fla.), 26 So. (2d) 194,* l.c. 197; *Mugford v. Mayor and City Council of Baltimore (Md.), 44 Atl. (2d) 745,* l.c. 747.] This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the

people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principle of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. [11 Am. Jur. 921, Sec. 214; 16 C.J.S. 337, Sec. 133; *A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570.]* If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers. Although executive and administrative officers [***32] may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. Such bargaining could only be usurpation of legislative powers by executive officers; and, of course, no legislature could bind itself or its successor to make or continue any legislative act. Therefore, this section can only be construed to apply to employees in private industry where actual bargaining may be used from which valid contracts concerning terms and conditions of work may be made. It cannot apply to public employment where it could amount to no more than giving expression to desires for the lawmaker's consideration and guidance. For these fundamental reasons, our conclusion is that Section [*1252] 29 cannot reasonably be construed as conferring [**546] any collective bargaining rights upon public officers or employees in their relations with state [***33] or municipal government.

Nor can there be any difference with regard to employees of the City in connection with its corporate or proprietary capacity. Defendants' contention that there should be is inconsistent with their contention that the word "employees" as used in Section 29 is all inclusive, covers all who could be classified as employees whether public or private, and cannot be limited to any class of employees. If this term is all inclusive so as to include any public employees, why would it not cover all such employees whether state, county or municipal, governmental or corporate? Moreover, some of the city employees involved herein are governmental. The proposed contracts covered all those in street work and some in sewage disposal plants. In protecting health and sanitation, even in keeping its streets clean and sanitary, a city is exercising governmental functions. [*Lober v. Kansas City, (Mo.), 74 S.W. (2d) 815* and cases cited.] The distinction between proprietary and governmental functions is one created by the courts mainly for the purpose of imposing some tort liability upon municipalities. [See 38 Am. Jur. 265, Sec. 573.] Nevertheless, "a municipal corporation [***34] cannot be a private corporation in any true sense of the word, but remains, even in its dual capacity, essentially a public corporation." [37 Am. Jur. 728, Sec. 114.] The question involved herein is a question of power rather than one of what function is involved. "Missouri cities have and can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the city." [*Taylor v. Dimmitt, 336 Mo. 330, 78 S.W. (2d) 841.]* Fixing compensation, hours and tenure require the exercise of legislative powers in exactly the same way for all employees of the City, whether governmental or corporate, at least under the organization of second class cities in this state. We do not say that the General Assembly could not separate corporate functions, and employees engaged therein, and provide for their operation and management in some manner distinctly apart from other city functions (perhaps like the Tennessee Valley Authority under the federal government) so that employer and employee relations could be handled on a basis similar to private industry. [***35] However, it is clear that this has not been done in our cities of the second class.

On the contrary, the General Assembly has provided a single civil service system for city officers and employees. (Sections 6678-6688) Under this system, the Civil Service Commission of the city must provide for the classification of all employments, for open, competitive, free examinations as to fitness, for an eligible list from which vacancies shall be filled, for a period of probation before employment [*1253] is made permanent and for promotion on the basis of merit, experience and record. (Section 6679) The Commission must be notified of vacancies and these must be filled from a certified list of highest candidates on the eligible list. (Section 6683) The eligible list is prepared from examinations with rank on the list determined from the results thereof. (Section 6684) The Commission must also classify laborers who are likewise placed on the eligible list in accordance with ratings received in examinations and tests, and positions in any labor class must be filled by appointment from the Commission's lists. (Section 6685) The Commission is required to keep records for making promotions [***36] on the basis of merit and may provide for filling vacancies by promotion, and also make rules for transfer and reinstatement. (Section 6686) All persons under civil service are subject to re-

moval by the department commissioner. (Section 6688) Thus the General Assembly has provided a single complete all inclusive scheme for selection, tenure, transfer, promotion and removal, which applies to all city officers and employees under civil service whether engaged in the governmental or corporate activities of the city. Likewise, all officers and employees are required to be paid a fixed salary or wage (Section 6672); and this "may be increased or decreased at any time" by the Council. (Section 6659) The term "employees" in a general statute, concerning [**547] relations of employers and employees, was held inapplicable to civil service appointees of a city in *Hagerman v. City of Dayton (Ohio), 71 N.E. (2d) 246,* in which it was also held that outside organizations could not interfere in the operation of the civil service provisions, similar to those herein involved. It seems obvious that, under the civil service laws applicable to the City, it must deal with all of its employees, [***37] regardless of kind or classification, on exactly the same basis and that is by the exercise of its legislative powers in accordance with the conditions fixed by the General Assembly. This clearly leaves the City no authority to deal with any employees involved herein on a collective bargaining contract basis.

The judgment is reversed and the cause remanded with directions to enter a decree in accordance with the views herein expressed. All concur.